FILE COPY.

Office Supreme Court, U.S.
FILED
JUN 9 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. ~~994~~ 1384

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,

Petitioners,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEON P. HOWELL
1412 Alamo National Building
San Antonio, Texas
Attorney for Petitioners

BRADFORD F. MILLER
519 Majestic Building
San Antonio, Texas
Of Counsel

INDEX

Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Rules Involved	4
Statement	5
History	5
Facts	8
Argument	11
Conclusions on Which Judgment Was Reversed Are Directly Conflicting	11
Court of Appeals Deprived Petitioners of the Rights Guaranteed to Them by the Seventh Amendment to the Constitution	16
Departure of the Court of Appeals from the Accepted and Usual Judicial Proceedings	42
Error of District Court in Holding Guarantor Liable on His Guaranty	50
Right of Court of Appeals to Direct Entry of Judgment for Respondent Where the Evidence Establishes That Some Money Was Owing on the Counterclaim	55
Summary	59
Conclusion	60
Appendix—	
A—Original Opinion Below	1a
B—Opinion Below on Petitioners' Rehearing	36a
C—Opinion Below on Respondent's Rehearing	40a
D—Judgment Below	43a
E—Orders on Rehearing Below	44a
F—Commercial Credit-Howard Corp Contract	45a

Citations

TABLE OF CASES

Atmoore Co. v. Dayless Mfg. Co., Inc., 208 F.2d 1 — 29
Broad River Lbr. Co. v. Middleby, 197 Fed. 817 — 39
Cameron v. First National Bank, 194 S.W. 469 — 54
Clark v. Mallory, 56 N.E. 1099 — 50
Ft. Worth & Denver Ry. Co. v. Janski, 223 F.2d 704 — 20
Hedger v. Reynods, 216 F.2d 202 — 49
Liberty Mutual Ins. Co. v. Thompson, 171 F.2d 723 — 19, 20
Lock v. Morris, 287 S.W.2d 500 — 28
Millers' National Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93 — 48
Phoenix Indemnity Co. v. Gironard, 252 F.2d 146 — 48
R. B. Spencer & Co. v. Thorp Springs Christian College, 41 S.W.2d 482 — 54
Revlon, Inc., v. Buchanan, 271 F.2d 795 — 59
Rice v. Webster, 18 Ill. 331 — 50
Seifert v. Brown, 53 S.W.2d 117 — 29
Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173 — 59-60
U. S. v. Wainer, 211 F.2d 669 — 50, 51
Woodsworth v. Commissioner, 218 F.2d 719 — 42
Wright v. Gordon's Transport, Inc., 162 F.2d 590 — 28, 29

TEXTS

Am. Jur., Vol. 15, p. 550, §141 — 33
Ann. Cas., Vol. 17, p. 381 — 29
C.J.S., Vol. 31, p. 1087, §311, — 28
C.J.S., Vol. 32, pp. 1113-4, §1040 (D) — 29
R.C.L., Vol. 10, p. 1098, §289 — 29
Tex. Jur., Vol. 17, p. 576, §240 — 28
Wigmore, Vol. IV, §1057 — 28
Wigmore, Vol. IV, §1058 — 28
Wigmore, Vol. IV, §1073 — 26

Wigmore, Vol. V, §1549 24
Wigmore, Vol V, §1556 24
Wigmore, Vol. V, §1557 36, 40-41
Wigmore, Vol. IX, §§2588-93 28

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution—

Seventh Amendment, U.S.C.A., Constitution, Vol. 3, p. 379 4

Rules—

Federal Rule of Civil Procedure 38 (a), 28 U.S.C.A. 4
Supreme Court Rule 19-1(b), 28 U.S.C.A. 60

Statutes—

28 U.S.C., §1254(1) 2
28 U.S.C., §2101(c) 2
28 U.S.C.A., §1732 20, 41
V.A.T.S., Art. 1327 54
V.A.T.S., Art. 5526 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,

Petitioners,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, and Dorothy L. Foster, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Western District of Texas. The District Court judgment had been entered in favor of Petitioners pursuant to a jury verdict in a civil action brought by Respondent against them for debt.

OPINIONS BELOW.

No opinion was rendered by the District Court.

The opinion of the Court of Appeals appears in Appendix A hereto, *post*, pages 1a-35a, is reported in 274 F.2d 449, 467. The opinion of the Court of Appeals granting in part and otherwise denying Petitioners' petition for rehearing appears in Appendix B hereto, *post*, pages 36a-39a, is not yet reported. The opinion granting Respondent's petition for rehearing appears in Appendix C hereto, *post*, pages 40a-42a, is not yet reported. These opinions are also to be found in the certified transcript of the record, Vol. VI, pages 1407-44, 1582-5, 1625-8.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 18, 1960, and appears in Appendix D hereto, *post*, page 43a. Petitioners' petition for rehearing was acted upon on April 11, 1960, and Respondent's petition for rehearing was acted upon on May 10, 1960. Appendix E, *post*, page 44a.

The jurisdiction of this Court is invoked under 28 U.S.C., §§1254(1) and 2101(c).

QUESTIONS PRESENTED.

1. Whether a federal appellate court can, after a jury verdict and judgment for Petitioners, deprive Petitioners of the rights guaranteed to them by the Seventh Amendment to the Constitution by reversing that judgment and directing entry of a money judgment for Respondent based

upon contradictory conclusions derived from the same facts.

2. Whether a federal appellate court can, after a jury verdict and judgment for Petitioners, reverse that judgment and direct entry of a money judgment for Respondent by

(a) resolving evidentiary conflicts *against* the parties prevailing in the District Court.

(b) rejecting or disbelieving the evidence which clearly presents a jury question.

3. Whether a federal appellate court may so far depart from the accepted and usual judicial proceedings that it can, after a jury verdict and judgment for Petitioners both in the main action and on the counterclaim, reverse that judgment and direct entry of judgment for Respondent by

(a) viewing the evidence *against*, rather than in favor of, the parties prevailing in the District Court.

(b) making fact-findings that are directly contrary to the evidence.

(c) substituting its fact-findings for those drawn by the jury from conflicting evidence.

(d) substituting its interpretation of technical accounting records and procedures for those testified to by the person charged with keeping the records and by certified public accountants who had examined the records and qualified as expert witnesses.

4. Whether the District Court erred in holding a guarantor liable upon his guaranty of a corporation's contract where

(a) the plaintiff sued all three of the guarantors and prior to trial dismissed two of them from its action, with prejudice, over the objection of the remaining guarantor.

(b) the authority of the officers acting for the corporation was specifically limited, by resolution, to entering into a *sales* contract and the contract they executed was a *lending* device.

5. Whether a federal appellate court can, after a jury verdict and judgment for Petitioners both in the main action and on the counterclaim, reverse that judgment and direct entry of a money judgment for Respondent where there is an evidentiary basis for the jury's verdict and the judgment entered thereon.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

3 U.S.C.A., 379, CONSTITUTION, AMENDMENT VII; Civil Trials:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to common law.

28 U.S.C.A., FEDERAL RULE OF CIVIL PROCEDURE 38(a); Jury Trial, Right Preserved:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE.

History.

The Respondent, Commercial Credit Corporation,[1] initiated this suit on July 1, 1954, in the Circuit Court, Milwaukee County, Wisconsin, against William R. Sorgel,[2] Dorothy L. Foster and Robert Howard, as joint and several guarantors of a contract that had existed between it and Howard Distributing Corporation.[3] The defendant, Dorothy L. Foster, had the cause removed to the United States District Court for the Eastern District of Wisconsin, on account of her diversity of citizenship, and it was thereafter transferred by that court, for convenience of the parties, to the United States District Court for Western District of Texas, San Antonio Division (R. I, 2-3).[4]

Howard Corp was a Texas corporation and operated a briefly prosperous merchandising business in San Antonio, Texas. William R. Sorgel, who resided in Ozaukee County, Wisconsin, owned 20% of its stock, his daughter, Dorothy L. Foster, and her husband, Edward L. Foster, each owned 15% and Robert Howard owned the remaining 50% of the stock. Robert Howard was the only officer and director of the corporation when it was dissolved by judicial forfeiture of charter, during the pendency of this suit, on October 24, 1955 (R. I, 34-6, 40).

---

1. For convenience in reference, hereafter called Commercial Credit.

2. William R. Sorgel died after the second trial of the cause and William J. Sorgel, executor of his estate, was substituted under Rule 25 (a) (1), F.R.C.P.

3. For convenience in reference, hereafter called, Howard Corp.

4. For convenience of the Court, the volume as well as the page of the record will be designated.

Respondent's suit sought recovery of alleged unpaid advancements of $41,790.12, interest in the amount of $39,739.87, expenses in the sum of $13,013.63, and attorneys' fees of $27,500.00. The advancements, interest and expenses were averred to be owing to Respondent by Howard Corp under a contract they entered into on April 28, 1953, and terminated on September 25, 1953 (R. I, 5-15).

The defendants, Sorgel and Foster, as shareholders of Howard Corp, filed a compulsory derivative counterclaim for that corporation's benefit, seeking to recover from Respondent overpayments growing out of the contract of approximately $65,158.87 (R. I, 34-6).

Prior to trial, Respondent voluntarily dismissed with prejudice its suit against the defendants, Howard and Foster, over the objection of, and after contest by, the remaining defendant, Sorgel (R. I, 3).

The cause was tried twice before a jury in the District Court. Following the first trial, the Trial Court on its own motion granted a new trial (R. I, 3). The cause proceeded to trial the second time and resulted in a jury verdict in favor of Petitioners, upon which findings judgment was rendered against Respondent on its main action and in favor of the shareholders on the counterclaim (R. I, 47-36, 94-8).

Respondent appealed from the judgment to the United States Court of Appeals for the Fifth Circuit (R. I, 100). Petitioners thereupon, to protect and present additional grounds for affirmance of so much of the judgment as decreed that Respondent take nothing by its suit, filed a cross-appeal based upon the failure of the Trial Court to sustain their motion for directed verdict (R. VI, 1390).

Respondent put to the Court of Appeals thirty-two points. Its principal points complained of the failure of

the Trial Court to grant its motion for directed verdict and its two motions for judgment *non obstante veredicto*, on the grounds its debt had been established as a matter of law and there was "no substantial evidence" to support the findings of the jury upon which judgment was rendered (R. I. 108-19). Petitioners, on their cross-appeal, advanced two specifications of error under their single point (R. VI. 1397).

The Court of Appeals reversed the lower court judgment and directed entry of judgment for Respondent, holding it was "without factual dispute" that Commercial Credit was entitled to recover the "*sum of $41,790.12, as principal amount due on July 12th*, $13,013.63 expenses covered by the contract, and $23,000.00 attorneys' fees" and remanded the cause to the District Court for the sole purpose of determining the amount of outstanding accounts receivable that were unpaid so that interest thereon could be computed (*post*, pages 32a-35a).

On Petitioners' petition for rehearing the Court of Appeals found and held that included in the principal sum of $41,790.12, for which it initially rendered judgment (*post*, page 35a), was "$7,315.57, which was 80% of $9,144.46 of accounts receivable assigned by Howard after September 25, 1953, the date of the termination of the contract, and for which Commercial Credit paid nothing" (*post*, page 37a). It amended and modified its opinion only to the extent of reducing the principal sum of $41,790.12, by the $7,315.57, and directed entry of judgment for Respondent accordingly holding, "on the record before us there was no substantial issue of fact as to appellant's right to recover the *sum of $34,474.55, as principal amount due on July 12th*, $13,013.63 expenses covered by the contract, and $23,000 attorneys' fees" (*post*, page 38a).

As to all other matters that petition for rehearing was denied (*post*, page 39a).

On Respondents' petition for rehearing the Court of Appeals set-aside the order entered on Petitioners' rehearing and reinstated the judgment under which the Court had initially concluded that the principal of the indebtedness owed by Howard Corp to Commercial Credit on July 12, 1954, was $41,790.12, holding, "The limited motion for rehearing [Respondent's] is granted and the original judgment and order of this Court dated January 18, 1960, is hereby REINSTATED." (*post*, pages 41a-42a).

Facts.

The contract[5] was executed by Howard Corp in San Antonio, Texas, on April 17, 1953 (R. I, 137). The guaranty was signed by the guarantors, Howard and Foster, also on that date in San Antonio, Texas (R. I, 138; II, 234-7), and was signed by the guarantor, Sorgel, at the request and in the office of Respondent in Chicago, Illinois, on April 22, 1953 (R. I, 133-4; V, 1204-5). The contract was thereafter accepted and executed by Commercial Credit in Chicago, Illinois, on April 28, 1953. Both instruments provide they are to be construed and governed by the laws of the State where the contract was accepted by Respondent (R. I, 137-8).

The guaranty was a continuing unconditional undertaking by the guarantors jointly and severally to pay and perform the obligations of the contract (R. I, 138).

On August 26, 1953, Respondent notified Howard Corp that it was cancelling the contract effective September 25, 1953, and same was terminated on that date (R. II, 258-

---

5. For convenience in reference by the Court, the pertinent provisions of the contract are included in Appendix F, *post*, pages 45a-47a).

9). Sorgel also terminated his guaranty on September 25, 1953 (R. II, 272-3).

The status of the Commercial Credit-Howard Corp account is determined, according to the contract, by taking the difference between the amount actually advanced by Respondent to Howard Corp on the accounts receivable while the contract was in force, and the amount Respondent recovered from the accounts receivable it acquired from Howard Corp. To which resultant figure would be added, if there was a debit against Howard Corp, or subtracted, if a credit resulted in its favor, any outstanding service charges on the accounts receivable "purchased" (paid 80% thereon), and expenses that were unpaid (R. I, 136-7). Since the evidence pertaining to whether Howard Corp was indebted to Commercial Credit, or vice versa, is the crux of Petitioners' argument it will be presented therein to avoid repetition.

Upon giving the notice of cancellation Respondent placed representatives in the office of Howard Corp to "look out fc Commercial Credit's interests." The first representative, W. F. Bracken, arrived around September 1, 1953, and was succeeded by one R. D. Weber on September fourteenth (R. II, 261, 346). Weber remained with the Howard Corp until about December 31, 1953 (R. II, 358).

While at Howard Corp, the representatives, acting for Commercial Credit, obtained additional accounts receivable for which it paid no money to Howard Corp (R. II, 267, 319, 338, 339, 376-8; V, 1026). These accounts receivable on which no advancements were made, totalled $46,723.40, of which $37,578.94 were procured between August 26, 1953 and September 25, 1953, and the remainder thereof amounting to $9,144.46 were acquired after the contract and guaranty terminated (R. V, 1121, 1172).

The first representative of Respondent spent considerable time, while with Howard Corp. in calling on account-debtors (R. II, 263-5) and his successor was occupied principally with writing collection letters, in the name of Howard Corp. to delinquent debtors (R. II, 357-8). Starting shortly after Respondent's representatives arrived in San Antonio, a large number of the account-debtors instead of paying their accounts returned the merchandise represented thereby, which merchandise was turned over to, stored by and in the name of, Respondent in various warehouses located in Denver, Oklahoma City, Dallas and San Antonio (R. II, 268-70, 361, 380-3; IV, 890, 902, 905, 907). By December 4, 1953, Respondent had moved the returned merchandise from all other warehouses and concentrated it in the Texas Bonded Warehouse at San Antonio (R. I, 13; II, 382-3; IV, 890-7).

This merchandise had been sold by Howard Corp for $68,445.36 (R. V, 1121-3), and the invoices covering same assigned to Respondent (R. II, 361, 392, 401; III, 635). The returned merchandise was placed under control of Respondent who exercised absolute dominion over it to the exclusion of Howard Corp and Petitioners (R. II, 268-70; IV, 882; V, 1082-3, 1090-4).

On March 2, 1956, Respondent had on hand only $42,013.93 of this returned merchandise (R. V, 1130-2), which was, upon its application, sold at judicial sale on that date for the nominal sum of $100.00 (R. V, 1216-17). The only withdrawals shown to have been made from the returned merchandise prior to the judicial sale amounted to $637.19 (R. V, 1139-46). Thus, leaving a discrepancy between the amount of such merchandise placed in Respondent's custody and that which it sold at the judicial sale of $25,794.44. The record is silent as to when or how Respondent disposed of this $25,794.44 of returned merchandise.

Respondent contended that, as of the date the contract and guaranty terminated, "there was a total of $67,355.55 in unpaid advancements (being 80% of the accounts assigned)" due it from Howard Corp which unpaid advancements "had been by the 12th day of July, 1954, reduced to the sum of $41,790.12, which basic sum is still due plaintiff under said contract." (R. I, 10).

This basic sum of $41,790.12 consisted principally of invoices of two account-debtors, one being Skillern & Son on which Respondent claimed to be due it the sum of $32,500.53 (R. III, 473-6; IV, 839-42; V, 1251-62), and the other is Ward Drug Company on which was due the sum of $1,409.18 (R. IV, 849-51); and, the remainder being the balance asserted to be owing on accounts receivable that Commercial Credit obtained after August 26, 1953, and for which it advanced no money to Howard Corp (R. III, 722-3, V, 1002-4, 1121, 1172, 1251-62).

ARGUMENT

Because of the length of the transcript of the evidence and the confused state of the record, the evidence deemed pertinent to the points relied on for allowance of the writ will be incorporated in footnotes for convenience in reference by the Court.

Conclusions on Which Judgment Was Reversed Are Directly Conflicting.

1. We need only look to the opinions of the Court of Appeals to ascertain that the evidence, from which it derived the amount of principal owed to Respondent by Howard Corp on July 12, 1954, was inconclusive and was held to be such by that Court (*post*, pages 32a-33a, 35a-39a).

and that the findings upon which it reversed the District Court judgment are contradictory.

(a) The Court of Appeals recognized that the principal of any debt Howard Corp might have owed to Respondent is evolved from the "gross face value" of only those accounts receivable "purchased" by Commercial Credit (advanced Howard Corp 80% thereon) while the contract was in force (*post*, pages 8a and 37a).

That Court then held there was a fact-issue as to the amount of accounts receivable Commercial Credit had actually "purchased" prior to the termination of the contract (*post*, pages 14a, 33a, 37a-38a); and, remanded the cause to the District Court for the purpose of having the amount of those accounts determined so that interest thereon could be computed (*post*, pages 35a and 38a).

In its original opinion, the Court predicated its finding as to the amount of principal on *all* of the accounts receivable Commercial Credit asserted were unpaid on July 12, 1954 and directed judgment to be entered in favor of Respondent for the sum of $41,790.12, as being the amount of principal due it from Howard Corp on that date (*post*, page 35a).

In the opinion on Petitioners' rehearing the Court of Appeals found "Commercial Credit's Exhibit B (plaintiff's Exhibit 15) *shows that the $41,790.12 figure is arrived at by charging Howard with '80% of the total accounts receivable unpaid at July 12, 1954'*", and based its findings as to the amount of principal on *the total of those accounts obtained while the contract was in force*, but without regard to whether they had been "purchased", *vel non* (*post*, page 37a).

That Court having held that the interest is computed upon, and the principal is derived from, the unpaid ac-

counts receivable "purchased" (paid Howard Corp therefor) while the contract was in force, it is axiomatic that if the evidence is conflicting as to the total amount of unpaid accounts receivable that were "purchased" for the purpose of computing the interest thereon, the same holds true as to the amount of those same accounts receivable for the purpose of taking 80% thereof in order to arrive at the amount of principal. If the evidence is inconclusive as to the amount of those accounts receivable for the first purpose it is just as inconclusive for the second.

The Court of Appeals having concluded there is a fact-issue to be determined by a jury as to the amount of unpaid accounts receivable Commercial Credit "purchased" while the contract was in force, and such determination having already been made by the jury, nothing was due to Respondent from Howard Corp on accounts at April 30, 1958 (R. I. 49), that finding is binding upon the appellate court.

(b) The Court of Appeals took cognizance of the fact that after August 26, 1953, at least $46,723.40 of accounts receivable were acquired by Respondent from Howard Corp which it did not "purchase", that is, pay Howard Corp 80% of their "gross face value" (*post*, page 14a).

The jury by its answers to Issues Nos. 14 and 15 (R. I, 54) found that Respondent acquired $46,723.40 of accounts receivable, for which it paid no money to Howard Corp, $37,578.90 of such accounts being obtained between August 26, 1953 and September 25, 1953, and $9,144.46 thereof after the contract terminated. Commercial Credit does not challenge the correctness of these findings. Nor were they disturbed by the appellate court (*post*, pages 1a-42a).

On Respondent's rehearing the Court of Appeals found that it had given full credit for $9,144.46 worth of accounts receivable which it did not purchase and same were in-

cluded in the 20% and 80% credits on July 12, 1954, of $15,342.59 and $19,579.81, respectively (*post*, page 41a).

This finding unmistakably conflicts with the Court's basic conclusions. It initially held that *none* of the "non-purchased" accounts were credited as payments against the Howard Corp indebtedness (*post*, pages 14a-20a) and continued to hold that the remaining $37,578.90 of "non-purchased" accounts were not so credited (*post*, pages 1a-42a).

These two credits total only $34,922.40, whereas, the "non-purchased" accounts receivable amount to $46,723.40. Further, Respondent alleged, and its records show (R. III, 575-6), that the total accounts receivable unpaid at July 12, 1954, was $76,712.52; and, even when the 100% ($46,-723.40) of these "non-purchased" accounts is deducted therefrom the balance remaining does not equal the $41,-790.12, but comes to only $29,989.12.

Thus, even under the findings of the appellate court and irrespective of which set of its figures is used, it is a certainty there is still included in the accounts receivable Respondent asserted to be unpaid at July 12, 1954, are $11,801.00 worth of "non-purchased" accounts obtained after August 26, 1953, ($46,723.40–$34,922.40=$11,801.00; also, $41,790.12–$29,989.12=$11,801.00). The Court of Appeals has, nevertheless, directed entry of judgment in favor of Respondent for 80% of *all* accounts receivable it asserted to be unpaid at July 12, 1954, or $41,790.12, as being the amount of principal owed on that date (*post*, pages 35a-42a).

(c) The jury, by its answers to Issues Nos. 1 and 14, necessarily found there were *no* unpaid accounts receivable outstanding on April 30, 1958 and that included in the accounts receivable asserted to be unpaid, on that date, were

all of the outstanding accounts for which Respondent advanced no money (see evidence set out in footnotes 15 and 16, *post*).

The Court of Appeals having correctly held that Commercial Credit is estopped from charging interest on accounts not "purchased" that it obtained after August 26, 1953 (*post*, page 33a), was compelled to hold, in order to be consistent, that Respondent cannot include in the alleged principal the 80% of the unpaid "non-purchased" accounts receivable obtained after August 26, 1953.

2. There are two additional conflicts in the legal conclusions on which the Court of Appeals reversed the District Court judgment.

(a) The District Court held that the contract was one for loans upon accounts receivable and the Court of Appeals in affirming said, "This Court having previously held as a matter of law that this was a loan contract, *Blackford* v. *Commercial Credit Corporation*, 5 Cir., 263 F.2d 97." (*post*, 3a).

It then held, "The great significance of this is that this contract *was* a sale of accounts receivable". (*post*, pages 4a-5a).

Although this latter conclusion is in direct conflict with the first, it was the basis upon which the Court of Appeals set aside the findings made by the jury in answer to Issues 6 and 7, submitting the defense of fraudulent misrepresentation (*post*, page 6a).

(b) After having first held this contract to be one for loans upon accounts receivable (*post*, page 3a; above quoted), the Court of Appeals then held that, under Section Second (a) thereof, "the contract between the customer, Howard, and Commercial Credit transferred full

title which Howard owned in all assigned accounts to Commercial Credit". This section, which the Court adopts, also provides that Respondent in addition to being vested with full title to such accounts receivable was, "*entitled to all of the ownership, title, rights, securities or guaranties possessed by customer* [Howard Corp] *in respect thereto and in respect to the property evidenced thereby*". (*post*, page 17a).

It was on this conclusion of absolute ownership by Commercial Credit of the accounts receivable and the merchandise represented thereby, that the Court of Appeals vacated the findings made by the jury in answer to Issues Nos. 10 and 12, and Issues Nos. 16 and 17, submitting the questions of whether Respondent exercised its option under Section Second (1) of the contract, to accept the returned merchandise it stored in various warehouses after August 26, 1953 and to accept the accounts receivable obtained after that date, on which no advancements were made by Respondent, as payments against the Howard Corp indebtedness (*post*, pages 18a, 23a-25a).

This contract was either a lending device or one for the sale of accounts receivable. It cannot be both. The findings of the Court of Appeals holding it to be a loan contract for some purposes and a sales contract for others are absolutely irreconcilable.

Court of Appeals Deprived Petitioners of the Rights Guaranteed to Them by the Seventh Amendment to the Constitution.

3. The Court of Appeals after having recognized the proper criteria to be used in arriving at the amount of the principal obligation under contract (*post*, page 8a), then concluded that the accountants for both the Respondent and Petitioners agreed that a balance of $67,355.55 was owing

to Commercial Credit by Howard Corp on September 25, 1953, when the contract and guaranty were terminated (*post*, page 20a) and proceeded to bottom its opinions on that conclusion (*post*, pages 8a-9a, 35a, 42a).

The evidence is, that there would be owing to Respondent, as of the date the contract terminated, if all of its charges against Howard Corp to that time were correct: according to Respondent's accountant, Rossiter, $16,677.49[6]; according to Respondent's officer, Kratz, $19,497.09[7]; according to Respondent's ledger, $23,873.89[8]; and, according to Petitioners' accountant-witness, Montag, $10,821.45.[9] Against either of which sums the jury may have selected, it had the duty, under the charge of the Court, to offset the debits it concluded from the evidence were erroneous or fictitious (R. I, 47-8). Such debits included, *inter alia*, 80% of the unpaid portion of the $46,723.40 in accounts receivable, for which no payment was made by Respondent, that the

---

6. Cash advanced to Howard Corp, $176,080.08 (R. III, 689), less cash collected by Commercial Credit, $162,013.71 (R. III, 693) for a principal sum of $14,066.37, plus unpaid expenses, $15.84 (R. III, 704) and accrued but unpaid service charges, $2,595.28 (R. III, 701-3).

7. Cash advanced to Howard Corp, $178,946.55 (R. IV, 820-3), less cash collected by Commercial Credit, $162,013.71 (R. IV, 853) for a principal sum of $16,932.84, plus unpaid expenses, per its records, $18.72 (R. III, 649-60) and accrued but unpaid service charges, per its records, $2,545.53 (R. III, 649-60).

8. Cash advanced to Howard Corp, $200,243.51, less cash collected by Commercial Credit, $178,933.87, for a principal sum of $21,309.64, plus unpaid expenses, $18.72 and accrued but unpaid service charges, $2,545.53 (R. III, 649-60).

9. Cash advanced to Howard Corp, $177,670.91 (R. V, 1114), less cash collected by Commercial Credit, $169,413.71 (R. V, 1115) for a principal sum of $8,257.20 plus unpaid expenses, $18.72 (R. V, 1118) and accrued but unpaid service charges, $2,545.53 (R. V, 1117-8).

Court of Appeals held to be an improper charge against Howard Corp (*post*, pages 32a-33a, 37a-38a, 41a).

The testimony referenced in footnotes 6, 7 and 9, *ante*, as well as that of Rossiter, Kratz and Montag quoted hereafter in footnotes 10, 11 and 12, negates the findings of the Court of Appeals that, "whatever testimony was given by appellant's accounting witnesses and by appellees' one accountant witness, Montag, relating to what we have above referred to as the basic figures, *is given from these ledger sheets*" of Respondent (*post*, pages 8a-9a, 41a-42a). This finding, which was the basis for the Court's conclusion that both sets of accountants agreed $41,790.12 was the correct amount of principal due Respondent, being invalidated by such testimony, the conclusion drawn thereon is also nullity.

The further vice in the Court of Appeals' conclusion, that by reason of Montag's testimony reconciling to the figure of $67,355.55 (the total amount the Court said was due Respondent on September 25, 1953) on cross-examination he thereby admitted the correctness of such figure, is:

First. Respondent plead that the $67,355.55 was the amount of "unpaid advancements (being 80% of the accounts assigned)" due it at September 25, 1953. (R. I, 10), *and not the total amount owing on that date*, as was held by the appellate court (*post*, pages 8a-9a, 20a). Thus, the finding of the Court of Appeals is contrary to Respondent's own pleadings.

Second. There is no statement of accounts prepared by Rossiter contained in the record of this case showing a balance of $67,355.55 due Commercial Credit from Howard Corp as of September 25, 1953; Rossiter testified such amount was $68,128.53 (R. III, 668-9). Hence, there being

no factual basis for such cross-examination, the testimony obtained thereon has no probative value.

Third. The figures used by Montag in the reconcilement were for the purpose of such hypothesis only. They were not the "basic figures" to which he had testified on direct examination, as shown by Montag deliberately omitting the "principal sum" he had testified to of $8,257.20 (R. V. 1114-5), and his use of the September service charges in the sum of $723.23 and the September telephone charges of $2.88, rather than all of the expenses that were unpaid on September 25, 1953, of $18.72 and the total service charges unpaid to that date of $2,545.53 (R. V. 1117-8; see footnote 9, *ante*).

Fourth. Montag explained he did not agree with Commercial Credit's application of credits and debits in arriving at such figure (R. V. 1198-9); viz., Respondent's inclusion therein of accounts for which Commercial Credit made no payment to Howard Corp. a $13,098.94 n.s.f. check and $32,500.53 allegedly due from Skillern & Son (see points 4 and 5, *post*).

The contradiction between Montag's testimony on direct and cross-examination, if in fact there be any, was subject to the explanation he gave and thus a question to be resolved by the jury. In *Liberty Mutual Insurance Co. v. Thompson*, 171 F.2d 723, 726 (C.A. 5) the Court held:

> "Moreover, it is the function of the jury, if it sees fit, to reconcile the testimony of any witness who has made inconsistent statements, or believe only such parts of his evidence as it deems worthy of belief; and the jury is not required to reject the testimony of any witness merely because there are conflicts therein."

Montag was offered as an expert witness (R. V. 1103-4). Assuming, *arguendo*, that his testimony could be con-

strued to be an admission, it was the opinion of an expert witness and thus, not binding upon Petitioners: *Ft. Worth & Denver Ry. Co. v. Janski*, 223 F.2d 704 (C.A. 5).

The opinion here under attack is in direct conflict with the decisions in the *Liberty Mutual Insurance* and *Ft. Worth & Denver Ry. Co.*, cases, *supra*.

4. Respondent had debited three items against Howard Corp. before the contract and guaranty terminated, that entered into the final accounting on which it asserted a principal indebtedness due from Howard Corp of $67,355.55 at September 25, 1953, the correctness of which items was challenged by Petitioners.

The first of these debit-items relates to an alleged check of Howard Corp for $13,098.94 it purportedly drew in favor of, and delivered to, Commercial Credit and payment thereof refused because of insufficient funds.

Respondent's ledger sheet which was admitted into evidence, under *28 U.S.C.A., §1732*, as its Exhibit No. 14 upon the testimony of Harry Kratz, the officer responsible for posting and maintaining the Commercial Credit records (R. III, 640-8; IV, 763-7), shows a debit-entry, dated September 1, 1953, for $13,098.94, bearing the notation, "CK. OF HOWARD NSF." (R. III, 649).

The opinion of the Court of Appeals considered the attack made by Petitioners against this one entry only (*post*, page 10a), and proceeds to hold that such item was a proper charge against Howard Corp (*post*, pages 12a-13a).

We will not trespass upon this Court's time by discussing the unfairly slanted findings and the dissertation in which the Court of Appeals indulges to reach its *non sequitur* (*post*, pages 10a-13a). That Court's action, however, in reweighing the evidence and its failure to mention

portions of the testimony which were favorable to Petitioners on this debit-item and its further failure even to consider the evidence disputing the correctness of other debit-items cannot be similarly passed over.

Respondent's accountant, Rossiter, testified that he included the alleged $13,098.94 n.s.f. check as a debit against Howard Corp in arriving at $41,790.12 being the amount owing by Howard Corp to Respondent, although he had never seen and did not know the date of the check or the reason it was not redeposited (R. III, 710-11).[10]

The officer-in-charge of Respondent's records, Kratz, testified that he had never seen the alleged $13,098.94 n.s.f. check, *that Commercial Credit did not have the check and had no record of it other than the entry on the ledger sheet*, nor did Commercial Credit have a record of deposit, or other bank records, of such check, and that the check was not presented to Respondent's accountant, Rossiter, dur-

---

10. "Q. That was all the money that Commercial Credit had put out as of that time, wasn't it?

A. There was in addition at that time unpaid checks—an unpaid check for $13,098.94.

Q. All right, sir. An unpaid check—

A. A Howard check remitted on report of collection number 4529, which was returned by the bank for n.s.f., and was never redeposited."

* * *

"Q. It was never redeposited. Do you know why?

A. No.

Q. *What was the date of that check?*

A. *That I don't have, because I have never seen the check.*

* * *

"Q. All right. But you don't know the date of the check?

A. No.

Q. You do not. All right, sir. In your opinion, then, you think this $13,098.94 should be added in as of September 25?

A. Yes."

ing the course of his examination of the Commercial Credit records (R. IV, 797-8).[11]

Petitioners' accountant-witness, Montag, testified that in making his audit of the Commercial Credit-Howard Corp account he had available and examined the Commercial Credit records and all of the books, records, files and accounts of Howard Corp (R. V, 1104-12), that he could find no record of the alleged $13,098.94 n.s.f. check having been issued by Howard Corp or received by Commercial Credit, that the amounts paid by Howard Corp to Respondent, as shown by the remittance reports, did not include a payment of $13,098.94, and that such reports agreed with their records (R. V, 1136, 1164, 1165-7, 1173, 1180-1, 1197).[12]

---

11. "Q. Now, do you have the $13,098.94 n.s.f. check which was supposedly given in payment of Collection Report Number 4528 dated August 27, 1953?"

A. The unpaid check for thirteen thousand dollars?

Q. $13,098.94.

A. No, I don't have that check.

Q. Where is it?

A. *I don't know where it is.* It was probably returned to Howard Distributing Corporation.

Q. *Did you, yourself, ever see that check?*

A. *I don't recall seeing it, no.*

Q. And Mr. Rossiter, I believe, testified he never saw the check, is that correct?

A. I don't recall what he said, Mr. Howell. *I haven't seen the check. It wasn't presented to Mr. Rossiter, I know that.*

Q. *Now, you have nothing to substantiate your entry with respect to that check, do you?*

A. *Except the entries on the ledger.*

Q. In other words, you don't have the check. *Do you have a deposit receipt* showing that the check was deposited and was returned?

A. That was one of those items that we could get a check to cover it, *if we paid the bank for it when it came back.*"

12. "Q. Mr. Montag, were you able to find any record of Howard Distributing Corporation having issued a $13,098.94 check, which is shown on the customer's ledger page?

Respondent's ledger sheet contains no credit-entry for the amount of $13,098.94 (R. III, 649-51). The remittance report No. 4529 embraces a number of separate transactions (R. V, 1184-91), and the consolidated entry thereof in the ledger sheet likewise embraces the same separate transactions (R. III, 649).

The fact that remittance Report No. 4529 is composed of a number of separate transactions totaling $23,984.46, including an itemized list of separate invoices amounting to $13,098.94, nullifies the Court of Appeals' conclusion,

---

A. No, sir."

* * *

"A. I have taken credit for the journal entry reported to be an n.s.f. check in the amount of $13,098.94.

Q. You've taken credit—

A. For which I have no record.

Q. —for a check of how much?

A. $13,098.94."

* * *

"Q. There's one additional thing that I can't understand. You say you charged Commercial Credit Corporation for that check for $13,098.94?

A. Yes, sir.

Q. *On what basis did you charge it to them?*

A. *I have no record that Howard gave them a check.*

Q. Well, if you have no record that Howard gave them a check, how do you charge them for it then?

A. *Well, the entry was picked up on Commercial Credit Corporation's records on the journal entry. I have no information pertaining to that journal entry. I don't even know what it is.*

Q. In other words, you could have taken that part of the Commercial Credit Corporation's records that says they got the check returned n.s.f. and charged it off as not being correct?

A. The remittance reports reflect that *I took the cash that was reflected by the remittance reports.* Normally, that would include only the checks from account debtors which Howard received and acted as an envoy and forwarded on to Commercial Credit. Now, I have no way of knowing whether $13,000 was paid by Howard for some of the account debtors

there was convincing evidence that the charge-back of the $13,098.94 n.s.f. check on September 1, 1953, was warranted by the entry of the proceeds of such remittance report on August 27, 1953 (*post*, page 10a). The only conclusion to be drawn from such an entry says *Wigmore, Vol. V*, §1549, is:

> "Again, the entry is not usable if it shows that it embraces in one item a number of *separate transactions*, or is in any way so loosely made that regularity of [*the*] entry cannot be predicated."

From the absence of an exact credit-entry for $13,098.94, *Wigmore, Vol. V*, §1556, states the conclusion is:

> "The *absence* of a debit-entry, in a book containing both debits and credits, should be regarded in effect as a statement that no such goods or services had been received * * * *Where, however, the book is offered by an opponent* (post 1557), *the absence of an entry of the transaction as claimed may properly be regarded as an admission that there was no such transaction* (ante, §1072)." (Emphasis added).

---

or what that $13,000 was. *I don't know that Commercial Credit Corporation ever received that $13,000 from Howard.*"

* * *

"Q. *Therefore you took one of their items which you had had no knowledge of before you had seen their books and accepted that, but you did not accept the other entry?*

A. *No, sir. I took the amounts off the report of remittances, which agreed with their records*" [Commercial Credit's].

* * *

"Q. * * * *Mr. Montag, do you find anywhere in that customer's ledger sheet of the Commercial Credit, where the $12,098.94 check was credited to Howard Distributing Corporation on that ledger sheet?*

A. *I can't identify it, no, sir.*

Q. *Well, do you find any such entries?*

A. *No, sir.*

Q. Such credit entry on there?

A. No, sir.

Although these principles are embraced in the section of *Wigmore* cited by the appellate court, it did not follow or apply them to the facts in this case (*post*, page 12a).

On this item the appellate court not only disregarded and rejected the evidence favorable to Petitioners, but reweighed the testimony and substituted its interpretation of the accounting procedures for those testified to by the witnesses.

The second debit-item consists of $40,625.66 of Skillern & Son invoices of which Respondent included 80%, or $32,500.53, in the principal sum for which the Court of Appeals directed entry of judgment against Petitioners (R. III, 473-6, 722-4; IV, 839-42; V, 1251-62).

Q. *Do you find on that ledger sheet anything to show that Commercial Credit Corporation actually received any such check?*

A. *No, sir*

Q. *Isn't it a fact that the only entry upon that ledger sheet with respect to the $13,098.94 check is the debit, that is, a charge against the Howard Distributing Corporation for that amount?*

A. *Yes, sir.*

Q. And the date of that is what, sir?

A. September 1st, 1953."

* * * *

Q. Doesn't that show that that check was with that collection report, that $13,098?

A. That shows gross face amount of invoices, $23,984.46; amount credited, $23,984.46, cash received $20,708.28; *and there were some shortages, $3,276.18; and then there's some more information on the side, which evidently was put there by Commercial Credit.*"

* * *

Q. Now, wouldn't your audit of the Howard books show that this check was remitted on that report?

A. I do not have a record of the customer's checks except on the original report of remittances.

Q. I'm talking about the Howard check. Would that come from anywhere else?

Commercial Credit placed in evidence as its Exhibit 22, *without any limitation*, the Howard Corp records pertaining to the Skillern & Son account, which lists, by dates, the invoices of Skillern & Son assigned by Howard Corp to Commercial Credit, the amount of each invoice and the payments made upon those invoices, showing a balance due of $884.60, as of February 11, 1954 (R. V, 1040-9). Thus, adopting the Howard Corp records, and thereby impeaching the entries in Commercial Credit's basic ledger sheet pertaining to that account. *Wigmore, Vol. IV, §1073.*

That is not the only use made of those records of Howard Corp by Commercial Credit.

Commercial Credit's Vice-President, Rogers, testified that Commercial Credit, on February 15, 1954, sent to Skillern & Son an "important legal notice" (Defendant's Exhibit 13, R. III, 615-9) listing, by dates, all invoices of Skillern & Son assigned to Commercial Credit, amount of each invoice and amounts paid thereon, showing a balance

---

A. *If it were a Howard check it would be entered in his records. He would have a check for that amount, or a copy of a check for that amount, if you received it and it was n.s.f.*

Q. It would not have gone back through his accounts, would it?

A. You should still have the check.

Q. I wasn't asking you that. *I said it would not have gone back through his accounts, would it?*

A. *It would have gone back.*"

* * *

"Q. * * * Now, I believe that Collection Report Number 4529, you testified, shows some balance of $13,098.94. May I see it, please? *There's nothing on that report, Mr. Montag, to show that the Howard Distributing Corporation ever issued a check for that, is there?*

A. *No, sir.*

Q. *And you found nothing in that check book or any other records to show that they ever issued a check for that amount, did you?*

A. *No, sir.*"

due of $884.60, for which payment was demanded; that its information as to the status of the account was obtained from Howard Corp and incorporated into that document (R. III, 473-5); *and that same was a correct statement of the account* (R. III, 476).

Kratz, under whose supervision Commercial Credit's records were maintained, testified that such records were untrustworthy as to the amount owing on the Skillern & Son account, that "we didn't know the exact condition of Skillern's account," and, therefore, requested and obtained the *copy of Howard Corp's ledger sheet on Skillern's* (Plf's Exhibit 22), reflecting the balance owing on that account as of February 11, 1954, to be $884.60, adopted and incorporated same verbatim into Commercial Credit's "important legal notice" which it directed to Skillern & Son on February 15, 1954, demanding payment of the $884.60 (R. IV, 839-42).[13]

---

13. "Q. I hand you here Defendant's Exhibit Number 13. Do you recognize it?

A. Yes, sir.

Q. What is it?

A. This is a statement of Skillern & Sons' accounts.

Q. What did you all call it?

A. Well, we listed this on an 'important legal notice.'

Q. All right, sir. Now, the balance shown on that is $844.60, isn't it?

A. That's correct."

• • •

"A *This statement was a statement that we had the Howard Distributing Corporation supply us with. We didn't know the exact condition of Skillern's account.*"

• • •

"Q. *Couldn't you have verified it against your records if you wanted to?*

A. *It couldn't have been verified against our records, Mr. Howell, because we have some forty thousand dollars worth of invoices that are unpaid on the Skillern account on our books.*

The act of Commercial Credit in placing into evidence the Howard Corp records pertaining to the Skillern & Son account; and, the testimony of Kratz and Rogers that Commercial Credit adopted and incorporated such Howard Corp records into Commercial Credit's "important legal notice" it sent to Skillern & Son demanding payment of the $884.60, were *judicial* admissions. *Wigmore, Vol. IV, §§1057 and 1058; Wright* v. *Gordon's Transport, Inc.*, 162 F.2d 590 (C.A. 5); *Lock* v. *Morris*, 287 S.W.2d 500, Tex. Civ. App. 1956 (ref. n.r.e.) and the authorities cited therein.

This testimony of Kratz, who was Respondent's official representative at the trial (R. I, 125, 154), and of Rogers, its Vice-President, also comes within the universally accepted rule, "the testimony given by or for a party may amount to a judicial admission and may be admitted and used against him as such at the same trial, or as primary evidence on a subsequent trial." *31 C.J.S. 1087, §311; 17 Tex. Jur. 576, §240; Wigmore, Vol. IX, §§2588-2593.*

Where a party introduces into evidence a written document, without limiting its purpose; he is held to be con-

---

Q. I understand that that's what you claim, but at that time you sent this notice to Skillern, you were claiming only $834.53, [$884.60] were you not?

A. That's right, because that's all Howard was claiming. They sent us the statement.

Q. *But Howard didn't send that statement to Skillern. You sent it, didn't you?*

A. *Yes, but we obtained the information from Howard which we sent to Skillern. We sent the notice.*

Q. *Why did you have to get the information from Howard?*

A. *Because we didn't know the condition of the Skillern account on their books.*

Q Did you know the condition of the Skillern account on your books?

A Yes, sir.

Q. *Well, why did you then go to Howard and get the information rather than take it off of your books?*

clusively bound by its recitations. *32 C.J.S. 1113-4, §1040 (D)*; *10 R.C.L. 1098, §289*; *17 Ann. Cas. 381, Seifert* v. *Brown*, Tex. Civ. App. 1932, 53 S.W.2d 117 (writ refused); *Atmoore Co.* v. *Dayless Mfg. Co., Inc.*, 208 F.2d 1 (C.A. 7-1953).

In the *Wright* case, *supra*, decided in 1947, it was said, "Plaintiff was bound by this testimony of his own witness." This holding is in accord with the law relating to the probative effect to be given the testimony of an official representative of a corporation-party. In the *Atmoore* case, *supra*, it is held that a party who introduces documentary evidence without limiting its purpose, is conclusively bound thereby. The opinion here under attack is in conflict with the federal decisions relating to the conclusive effect of evidence on the party offering it.

The third of these debit-items pertains to $1,409.18 due from Ward Drug Company, who operated stores in Dallas,

---

A. *Because we knew it would be foolish to send them out any statements from our books, because that isn't what they owed Howard.*

Q. *You didn't know what they owed Howard, did you?*

A. *No, not until we got the statement.*

Q. Or you didn't know what they owed you, did you?

A. We knew what was open on our books, sure.

Q. If you knew, why did you only send them a statement of *$843.35*? [884.60.]

A. Because we knew that all of those invoices weren't collectible."

* * *

"Q. You had collection reports on them did you not?

A. We had whatever collections Howard sent to us, that's right.

* * *

Q. Have they ever paid that amount?

A. No, they haven't.

* * *

Q. Did you ever make any demands upon them, other than for that *$834.53*? [$884.60.]

A. Not that I know of, no, sir."

Ft. Worth and Grand Prairie, Texas, which Respondent included in the principal sum of $41,790.12 (R. III, 649-54; IV, 849-51; V, 1259-62).

Respondent's accounting-witness, Kratz, identified the letter of which a notation is made in Defendant's Exhibit 13-B under "WARD DRUG STORES" (R. V, 1259). He then testified that such letter reflected Ward Drug offered to pay the $1,409.18 to Respondent, but Commercial Credit took no action with respect thereto (R. IV, 851) and permitted the account to remain uncollected for more than two years (R. V, 1005-6). As a consequence the account became barred by the Texas two-year statute of limitations, *Art.* 5526, *V.A.T.S.*[14]

It is manifest that the Court of Appeals not only reweighed the evidence pertaining to the alleged $13,098.94 n.s.f. check but disregarded and refused to consider the evidence bearing upon the Skillern & Son and Ward Drug accounts and failed to apply the proper evidentiary and legal tests thereto.

5. There were three additional items charged by Respondent against Howard Corp after the contract and guaranty terminated, that entered into the final accounting on which Commercial Credit asserted an indebtedness against Howard Corp of $94,533.62 as of April 30, 1958 (principal of $41,790.12, interest in the sum of $39,739.87, and expenses of $13,013.63), which were challenged by Petitioners.

---

14. "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

* * *

"4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

"5. Actions upon stated or open accounts * * *"

The first of these items concerns Respondent charging interest from July 12, 1954, to April 30, 1958, on $19,579.81 it had recovered from accounts receivable and applied as a net credit to Howard Corp on July 12, 1954.

The evidence conclusively shows that Respondent computed and charged interest from July 12, 1954, to April 30, 1958, on the $19,579.81 it had collected and credited on July 12, 1954. This interest is included in the total amount of service charges Respondent asserted to be due it (R. I, 11).[15]

---

15. Plaintiff's Exhibit 15—"Particulars of Claims Against Wm. K. Sorgel, etc.," prepared by Respondent's accountant, Rossiter (R. III, 675-6), shows:

	Recorded on Loan Control Card
"Total assigned accounts receivable unpaid at July 12, 1954	$76,712.50
"Deduct—Contingent reserve of 20% of unpaid accounts	15,342.59
"80% of assigned accounts receivable unpaid at July 12, 1954	$61,369.91
"Less reserve adjustment—Net credit resulting from schedules of assignments credited, collection reports, debits and credits, unpaid checks, checks on account, and miscellaneous adjustments	19,579.81
	$41,790.12"

Respondent's officer-witness, Kratz, testified:

> "Q. We know that. I am asking what the report shows—*it does not show that although the nineteen thousand five hundred and seventy-nine dollars was credited as cash against the outstanding accounts* as of *September 30, 1958* [July 12, 1954]. Commercial Credit continued to compute its interest upon the entire $76,712.50? (Parenthetical date supplied.)
>
> A. *That's correct.*
>
> * * *
>
> Q. He says those are nets.
>
> A. Yes, they are net credits, that's right.
>
> Q. That's a net credit, is it not, against the balance of $76,712.50?

The significance of this is two-fold. First, Commercial Credit is no more entitled to interest on money it recovered and applied to the Howard Corp. indebtedness than it is entitled to interest on accounts not "purchased" (paid no money thereon). Second, Respondent's charging of such service charges and the entry thereof in its records went to the credibility and weight the jury could give to those records.

The jury, by its answer to Issue No. 1, rejected Respondent's contention (R. I, 49). The Court of Appeals reversed that finding.

The second debit-item relates to expenses amounting to $170.25 for which Respondent had no proof except the entry in its records, nor did it produce documents to substantiate same (R. IV, 789-90, 791-2, 793; V, 990), and other expenses in the sum of $2,283.61 for which no proof was made as to the necessity therefor and reasonableness thereof.

A. That's true; it's a net credit against the account, that's right." (R. IV, 806).

Montag, Petitioners' accountant, testified on this matter:

"Q. * * * On that analysis of Mr. Rossiter's, there is shown as of July 12, 1954, to be the sum of $76,712.52 in outstanding accounts receivable as of that date, does it not?

A. Yes, sir.

Q. It also shows, does it not, Mr. Montag, a net credit against that amount of $76,712.52, an amount in the reserve adjustment of $16,579.81?

A. Yes, sir.

Q. Now, according to the pleadings of plaintiff and the contract which has been introduced here in evidence and the analysis of Mr. Rossiter which you have before you, Commercial Credit Corporation is charging interest on the entire $76,712.52 since July 12, 1954. Now, *I'll ask you if* under those circumstances *Commercial Credit Corporation is not computing and claiming interest on moneys that it had received* but had not disbursed to the Howard Distributing Corporation?

A. Yes, sir." (R. V, 1178).

The Court of Appeals recognized the failure of proof in respect to the expenses amounting to $170.25 (*post*, pages 7a-8a) yet directed entry of judgment therefor in favor of Respondent (*post*, page 35a), "We hold, therefore, on the record before us there was no substantial issue of fact as to appellant's right to recover * * * $13,013.63 expenses covered by the contract * * *." This $13,013.63 represents all of the expenses for which Respondent sought recovery (R. I, 12).

It was stipulated that only $10,739.02 of the expenses were necessary and reasonable (R. IV, 763). No separate issue was requested or submitted to the jury as to the necessity for, and reasonableness of, the remaining $2,283.61 in expenses for which the Court of Appeals also directed entry of judgment (R. I, 49-56, 57-61). These expenses were primarily for travel of attorneys and witnesses in this case (R. III, 666-7; IV, 774-6).

It is fundamental that Respondent was required to show that such expenses were both necessary and reasonable, and obtain a finding to that effect, before it can recover same. *15 Am. Jur. 550, §141.*

The third of these debit-items consists of $9,144.46 of accounts receivable that were obtained from Howard after the contract terminated. It is Petitioners' contention, and the jury found by its answers to Issues Nos. 1, 14 and 15, that 80% of those invoices, or $7,315.77, is included by Respondent in the principal of its alleged debt of $41,790.12 (R. I, 49, 54).

On Petitioners' rehearing the appellate court found and held that the $7,315.77 was so included and amended its judgment accordingly (*post*, pages 37a-38a).

On Respondent's rehearing the appellate court rescinded its finding, set aside the judgment rendered on the

previous rehearing and reinstated its original judgment, holding that same was not included and the principal of the indebtedness owed by Howard Corp to Commercial Credit on July 12, 1954, was $41,790.12 (*post*, page 42a).

In reaching that conclusion the appellate court said, "We are firm in the conviction, however, that the reading and interpretation of these figures [shown on the ledger sheet] is within the province of the Court and not of the jury" (*post*, page 42a), wholly ignoring the interpretation placed on such accounting record, and the procedures used by Respondent in maintaining it, that were testified to by the officer under whose supervision the record was posted and by the two accountant-witnesses, who had audited the records from which such ledger sheet was compiled.[16]

Each of these witnesses also testified that the credit entries in the ledger sheet were credits for "money paid Commercial Credit by Howard Corp" (see footnote 19, *post*). The appellate court rejected that testimony and substituted its own interpretation of the entries (*post*, pages 16a, 19a-20a).

---

16. Respondent's accountant, Rossiter, explained plaintiff's Exhibit 15:

"A. That was done in effect in this way. As those schedules were bought, a card was opened for each of the customers of Howard, for whom an invoice or invoices were received. As the reports of collection came in and the invoices were cleared, those invoices were cleared on the card as of July 12, 1954. The ledger cards show that there was $76,712 outstanding on these accounts receivable.

* * *

"Q. * * * the individual invoices, or the cards, or whatever you are talking about, that went to make up the seventy-six thousand some odd dollars

A. I will have to have my case from the coat rack to do it I have that trial balance in the case.

Q. And it lists each of those accounts?

A. It lists the individual debtors, it lists the individual unpaid invoices.

The jury in arriving at its answer to Issue No. 1, had the duty to weigh and take into consideration the testimony of those witnesses relating to the ledger sheet and the construction placed thereon by them and by Respondent's Exhibit 15 (see footnote 15, *ante*).

In the opinion on Respondent's rehearing the Court of Appeals frankly admits the difficulty of interpreting both the records of Respondent and the technical accounting procedures employed by it in maintaining those records (*post*, page 42a). It, nevertheless, chose to ignore or disbelieve the construction given thereto by Respondent's

---

Q. All right, sir. Let's have them.

A. (Witness gets his brief case.)

Q. Is that the list, sir?

A. This is the list. It is a trial balance of the accounts unpaid as of July 12, 1954, prepared by Commercial, employees of Commercial Credit, listing by the customer Howard the individual invoices still open or, in the case of a partial payment applied to an invoice, the gross amount of the invoice, the amount of the partial payment applied and the remaining balance.

* * *

Q. That listed each individual account debtor, did it not?

A. Yes.

* * *

Q. May I have that, please, sir?

A. (Witness hands document to Mr. Howell.)

Mr. Howell: We request that this be marked for identification as Defendant's Exhibit 13-B.

(Thereupon the document above referred to was marked for identification by the Reporter as Defendant's Exhibit 13-B.)" (R. III, 722-4.)

* * *

Defendant's Exhibit 13-B (R. V, 1251-62) shows that $9,144.46 of accounts assigned after September 25, 1953, are included in the total of outstanding unpaid accounts from which the principal sum of $41,790.12 is derived (R. V, 1026).

* * *

Respondent's witness, Kratz, testified (R. V, 1002-4) on this matter:

accountant-witness and its officer charged with maintaining the Commercial Credit records, as well as the interpretation placed thereon by Petitioner's accountant-witness, Montag, and boldly proceeds to usurp the jury's function by reweighing the evidence and by judging the credibility of those witnesses.

6. The Court of Appeals held, "Here there was no impeachment of the books [Commercial Credit's].* * * Absent any proof there were errors in other entries * * * the item [alleged $13,098.94 n.s.f. check] must therefore be given effect as a charge against Howard" (*post*, pages 12a-13a), citing as authority for its holding *Wigmore, Vol. V, §1557.*

(a) Among the entries in Respondent's books are debit-items consisting of the unpaid balance on the $46,723.40 of accounts receivable that were obtained from

---

"Q. Well, *Mr. Kratz, you have included in these accounts assigned, in this figure of $76,712.53, all of the accounts which were assigned after August 26, 1953, have you not?*

A. On this list [Exhibit 13-B], which is the April 30, 1958, list, *this is a list of unpaid and outstanding accounts receivable. Whatever amount of invoices that were unpaid on those schedules assigned after September 25th, would appear on this list.* Now, I can't give you any total of what they were.

Q. *You don't know what the totals are but you know they are on the list?*

A. They would be on the list; *whatever amounts were unpaid on those schedules after September 25, 1953, would be on here.*"

* * *

"The Witnesses: Well, after the 25th. It starts with the 26th and subsequent, totaled $42,727.55.

Q. (By Mr. Howell) That's your total. No—

A. May I explain this further before I get through?

The Court: Go ahead.

The Witness: On accounts totaling $3,583.09 the eighty per cent of that was $2,866.47. That figure represents those two checks that we discussed before, one for $2,145.56, and

Howard Corp after August 26, 1953, on which no advancements were made, and 80% of which is included in the principal of $41,790.12, Respondent asserted to be owed to it on July 12, 1954 (R. III, 675-6, 722-4; V, 1002-4, 1026).

On both Petitioners' and Respondent's rehearings the Court of Appeals held, as a matter of law, that such debit-items were an improper charge against Howard Corp (*post*, pages 32a-33a, 37a-38a, 41a); consequently, the debit-entries with respect to such items were likewise erroneous.

The Court in an effort to sustain its holding that Commercial Credit's books were not proven to be untrustworthy by the inclusion therein of those erroneous entries, takes the position that such entries do not reflect on the accuracy of Respondent's books (*post*, page 38a) and that

---

one for $720.91. Those checks were drawn, I think you will recall, and were then taken by us and debited to cash and credited to the reserve adjustment account of Howard Distributing. That's what happened on those two. *The balance of the schedules of accounts totaling $9,144.46, on which eighty per cent was $7,315.56*, were credited to the reserve adjustment account."

. . . .

"Q. All right, sir. Then what you are doing here, are you not, Mr. Kratz, is asking this jury to return a verdict in your favor for $9,144.46 worth of accounts, which were assigned after the contract was terminated and after the guaranty was terminated, are you not?

A. Well, those accounts were merely taken as security for the debt, that's all. Anything that came into our hands would be so much money to reduce the debt. Now, if they produce money, it would reduce debt.

Q. *But you no longer had a contract with anybody, did you?*

A. *Well, the contract was canceled on that date. That's true.*"

. . . .

"Q. (By Mr. Howell) Now, Mr. Kratz, I will ask you if you are not *also* trying to collect from Mr. Sorgel the amount shown in Schedules 1427 and 2619, dated August 26, 1953, and December 4, 1953, which was shown to you and examined by you yesterday, which reflect to be sales of CCC merchandise?

A. *Then are included in the figures, yes.*"

it is province of the appellate court to construe those records, rather than a jury function to draw a conclusion as to the meaning of the entries therein based upon testimony of the accountant-witnesses and the witness charged with keeping the records (*post*, page 42a). The Court thus repudiated the very principles declared by *Wigmore* cited as the basis for its holding that Respondent's books were not impeached.

Book entries are either correct or incorrect. Where the meaning of the entries is placed at issue, as in this case, their accuracy, *vel non*, must be determined by the jury from the greater weight of credible evidence. Should the sophisticism of the appellate court be followed, the untrustworthiness of a party's books could never be demonstrated.

(b) Further, in respect to the findings of the Court of Appeals that the books of Respondent were not impeached (*post*, page 12a) and "there was no substantial issue of fact as to appellant's right to recover the sum of

---

Mr. Montag, Petitioners' accountant, testified (R. V, 1148, 1150-2), on cross-examination:

* * *

"Q. Now, Mr. Montag, this Defendant's Exhibit Number 41, which is a schedule prepared by you, which says, 'Howard Distributing Corporation Accounts'—you have an item up at the top, 'Amount due Commercial Credit Corporation as of September 25, 1953, on cash transactions * * *. Now, I wish you would break that figure down for me and show me where that figure comes from * * *?"

* * *

"Q. Now, let me get you to do the same thing on the next item, *which is amounts due Howard Distributing Corporation as of September 25, 1953, on cash and cash transactions?*

* * *

Q. All right. And your next one?

A. *The next one is accounts assigned after 9-25-53.*

Q. All right.

A. *That's $9,144.46.*"

$41,790.12, as principal amount due on July 12th" (*post*, pages 35a, 42a). Respondent's officer-in-charge of its records and who was its official representative at the trial, Kratz, testified that while giving testimony on the first trial he swore, (1) he never heard of any such figure of $41,790.12, prior to that time; (2) he could not "even identify the figure yesterday until I got a-hold of this statement" [from Commercial Credit's attorneys]; (3) Commercial Credit had no record of any such figure of $41,790.12; (4) he could not identify the accounts that made up the amount of $41,790.12; (5) "Commercial Credit had no outstanding accounts receivable amounting to this figure of $41,790.12," and, (6) the claim alleged in Commercial Credit's complaint: "the aggregate amount of unpaid advancements made by plaintiff to Howard Distributing Corporation under said contract and its guaranty by defendant, Sorgel, on said corporation's accounts receivable was $41,790.12," *was in error* (R. V, 1012-16, 1018).[17]

In *Broad River Lumber Co. v. Middleby*, 197 Fed. 817 (C.A. 4-1912), the Court said:

> "Inasmuch as this is the defendant's own testimony, it should be binding upon him as to the amount * * *"

The holding in that case is in accord with the law relating to the binding effect of a party's own testimony. The opinion here under attack is in conflict with the federal decisions on this fundamental principle.

---

17. "Q. *Can you identify the accounts which go to make up this figure of $41,790.12?*

A. *I can only identify the—I mean I can't identify specific accounts that would make that total.* * * *

Q. Isn't it a fact upon the last trial of this cause that you testified on October 9, 1952, that you could not identify any accounts which went to make up the $41,790.12?

A. Well, I say [*sic*] * * I did now, that *there is no specific accounts receivable amounts that would total $41,790.12.*"

(c) Respondent's Vice-President, Rogers, testified that Kratz swore falsely in answer to defendants' request for admissions Nos. 10, 11, 38 and 41 (R. III, 483-88). Kratz also testified that his sworn answers to those requests were false (R. IV, 812-17).

The veracity of Respondent's officer charged with posting and maintaining its records being thus impeached, the trustworthiness of the records kept under his supervision was an issue for the jury. *Wigmore*, Vol. V,

---

Q. *I will ask you if you had ever heard of this figure of $41,790.12 before you testified on October 9, 1957?*

Witness: *I made that answer at the former trial, yes.*

* * *

Q. *Isn't it a fact that Commercial Credit Corporation had no outstanding accounts that went to make up the figure $41,790.12 at the time you testified on October 9, 1957?*

A. Yes. I said at that time that we had no specific receivables that would add up to or make up that figure.

Q. *I will ask you if this identical question wasn't asked, and this answer given by you. In other words, you have no outstanding accounts receivable amounting to this figure of $41,790.12 according to your testimony, is that right?' Answer: 'That's right.'*

A. No specific figure that would make up $41,790.12, no figures. * * *

Q. *Isn't it a fact that the allegation contained in paragraph 9 of the amended complaint is in error?*

A. *What it is—I don't know what it is?*

Q. *I just read it to you.*

A. Just read what?

Q. The allegation in paragraph 9 of your third amended complaint.

A. * * * supposed to remember that right now?

* * * *

Q. *I will ask you if upon the last trial of this cause this question was not asked, and this answer given by you: 'Let's see what you allege here, whether or not it was an accounts receivable figure. This is your pleading, Mr. Kratz. As of November 30 the aggregate amount of unpaid advancements paid by plaintiff to Howard Distributing Corporation under said contract and its guaranty by Sorgel on said corporation's accounts receivable was $41,790.12. Answer by you: Well, then it was in error, because that is not the figure.'*

§1557(1). Although the appellate court adopted this section of *Wigmore* it refused to apply this evidentiary principle announced therein.

Commercial Credit's right to, and the amount of, recovery was submitted to the jury in one ultimate issue—the amount, aside from attorneys' fees, due Commercial Credit from Howard Corp as of April 30, 1958 (R. I, 49).

This issue embraced three elements of recovery, *viz.*, principal sum, unpaid service charges and unpaid expenses.

Commercial Credit interposed no objection to the submission of its ultimate issue in such form, nor did it request issues be separately submitted on either of the three elements embraced therein (R. I, 57-64).

Respondent had the burden in the Court of Appeals of showing, by undisputed evidence, that it had established its right to, and amount of, each of the three elements of recovery submitted in its one ultimate issue. The mere fact that its ledger sheet was admitted in evidence, under 28 *U.S.C.A.* §1732, does not render conclusive the correctness

---

A Well, Mr. Howell, that's probably what I answered at the trial."

. . .

"Q (By Mr. Howell) All right, sir. I will ask how it was you didn't testify on October 9, 1957, upon the last trial of this cause that Commercial Credit Corporation had no record of the figure of $41,790.12?

A Mr. Howell, doesn't that get to the explanation that I made previously that—

The Court: He is asking you what you testified to.

The Witness: Yes, that's true, yes, that's true.

Q (By Mr. Howell) All right. Did I understand you did so testify?

A That's right".

. . . .

The testimony of Kratz given on the first trial and filed among the papers in this case before the second trial, is set forth in Vol. VI, at pages 1365-70 of this record.

of the entries therein in respect to the three elements of recovery. *Woodsworth* v. *Commissioner of Internal Revenue Service*, 218 F.2d 719 (C.A. 6-1955), wherein the Court held:

> "Book entries are, of course, not conclusive but are evidential."

The opinion here under attack is in direct conflict with the decision in that case.

Departure of Court of Appeals from the Accepted and Usual Judicial Proceedings.

7. Petitioners, by way of derivative counterclaim, sought to recover for Howard Corp the value of merchandise that was returned by account-debtors after August 26, 1953, and placed under the exclusive control of Commercial Credit, and the "non-purchased" accounts receivable acquired by Respondent also after August 26, 1953, on the theory that Commercial Credit exercised its election under Section Second (1) of the contract (*post*, pages 46a-47a) to accept and apply that merchandise and those accounts as payments on the indebtedness it was asserting against Howard Corp (R. I, 25, 26-27, 35-6).

The jury found that such merchandise and accounts were so accepted and applied by Petitioner, Issues Nos. 10, 16 and 17 (R. I, 52, 54-5). The Court of Appeals held there was no evidence that Respondent exercised its option under the contract and elected to apply that merchandise and those accounts receivable as payments (*post*, pages 17a-18a).

That the appellate court did not even mention or consider the evidence pertaining to, or the effect of, the failure of Respondent to account for $25,794.44 worth of this re-

turned merchandise will be presented under point 12, *post*, pages 57-9.

(a) The conclusion of the Court of Appeals, there was no evidence disputing the testimony of Respondent's witnesses that the accounts receivable obtained by Commercial Credit after August 26, 1953, and for which it made no payments, were taken by Commercial Credit merely as additional security (*post*, page 13a), could only have been arrived at by ignoring all evidence favorable to Petitioners on this issue (R. II, 267, 319, 338-9, 377; see footnotes 19, 20 and 21, *post*), including Respondent's written admission against interest.[18]

(b) The conclusion of the Court of Appeals that the credit-entries in Respondent's ledger sheet of the $46,743.40 of accounts receivable, obtained by it after August 26, 1953, and for which it advanced no funds, were not credits for cash and were nothing more than potential credits (*post*, pages 15a-16a), could only have been reached by that Court substituting its interpretation of such record for the interpretation placed thereon by both of the expert accountant-witnesses, Rossiter and Montag, and by the officer, Kratz, under whose supervision the record was

---

18. Following the execution of the contract Commercial Credit sent Howard Corp instructions to be followed by Howard Corp in maintaining its records of the assigned invoices (R. V, 1020-1), which instructions (R. I, 222) contained this declaration:

> "You borrow no money from us, but SELL US OUTRIGHT certain specific invoices, MARKING YOUR RECORDS so that our accounts can be easily identified. All customers' original checks, notes, drafts, acceptances, etc., received in payment of, or on account of invoices sold us are OUR PROPERTY and not yours, and they MUST BE FORWARDED to us and NEVER DEPOSITED BY YOU as they are NOT YOUR PROPERTY."

maintained, *id est*, such credit-entries were credits as for "money" Howard Corp paid to Commercial Credit."[19]

8. The finding made by the Court of Appeals "there was no evidence of an exercise by Commercial of any option [under Sec. Second (1) of the contract] to convert the accounts held as security into accounts taken at their face value as payment" (*post*, page 18a) upon which it concluded, "there was no basis for the submission to the

---

[19] Rossiter defined "credits" as used by Commercial Credit in posting credits to its ledger sheet:

"Q. Now, simply, a debit is the amount of money owing, isn't it, and a credit is the amount of money collected, is that right?

A. When you are looking at an account receivable, a debit is a charge against the debtor, money which the debtor owes to the creditor.

Q. That's right.

A. *And a credit would represent a credit to the debtor, which would be money that the debtor pays to the creditor.*

Q. Right. *Now, in this instance, it would mean—a debit would mean the amount of money that Howard Distributing Corporation owed to Commercial Credit?*

A. *Yes.*

Q. *A credit would mean the amount of money that the Howard Distributing Corporation paid to Commercial Credit?*

A. *Yes.*" (R. III, 682-3).

Kratz testified that the credits were:

"Q. *You heard your accountant testify* on the stand here yesterday or Friday I believe, did you not, and he testified *that in maintaining accounting records, that a debit meant the amount owed, and a credit meant the amount collected. Now, do you keep some other, different type of bookkeeping?*

A. *No, we don't keep any other than these ledger sheets here.*

Q. *Well, does your word 'credit' that you used on there mean something different than what it is normally used in bookkeeping circles?*

A. *No.*" (R. IV, 864-5).

Montag testified as to the credit entries:

"Q. Does that ledger sheet show that those sums were to be anything other than a credit against the Howard Distributing Corporation indebtedness as of September 25, 1953?

jury of the special issue as to whether Commercial Credit had accepted $46,723.40 worth of accounts receivable subsequent to August 26, 1953, to be credited upon Howard's account with it" (*post*, page 19a) is directely contrary to the testimony of the witnesses who testified on this matter.

(a) The representatives Respondent placed with Howard Corp testified they requested and were given the accounts receivable Respondent acquired after August 26,

---

A. No, sir.

Q. Therefore, Mr. Montag, there being no evidence on the ledger sheet showing to the contrary, didn't you as an accountant have to assume that the credit shown thereon meant exactly what the ledger sheet shows them to be?

A. Yes, sir.

Q. That is, credits against the Howard Distributing Corporation indebtedness as of September 25, 1953?

A. Yes, sir.

Q. Now, the term 'credit' as used in accounting circles has been defined by Mr. Rossiter, the Commercial Credit Corporation's accountant, during the time he was testifying here, to mean a credit against indebtedness; that is, a reduction of the debt by the amount of credit. Do you agree with that definition?

A. Yes, sir.

Q. Is that the accepted definition of 'credit' in accounting circles?

A. Generally, yes, sir.

Q. Is there anything on that ledger sheet of Commercial Credit to show any other meaning should be given to the credits shown thereon?

A. I don't think so." (R. V, 1175-6).

Kratz further testified:

"Q. (By Mr. Howell) Is there any memorandum, suspense column, or items, or notations, on the ledger sheet showing that Commercial Credit intended those credits to be other than *cash* credits?

A. Well there is no notations on the ledger page.

Q. Are there any memorandum on the ledger page?

A. No." (R. IV, 1023-4).

1953, and that same were accepted by Commercial Credit *in replacement* of accounts receivable previously assigned.[20]

(b) Commercial Credit did exercise its option, under Sec. Second (1) of the contract, to convert at least three of the schedules of accounts receivable, obtained by it from Howard Corp after August 26, 1953, totaling $10,371.46, into "accounts taken at their face value as payment" by issuing its own checks therefor and crediting the proceeds, as cash, against the indebtedness it was asserting against Howard Corp. Respondent's officers further testified that all accounts receivable acquired after that date could have been similarly treated, and if such had been done the results

---

[20] Respondent's representative, Braken, testified:

"Q. (By Mr. Trueheart) Did you agree to accept any bills?
A. If he was making sales at the time, I believe I would have, probably did, accept a few schedules of accounts to help make up shortages that were due, at least prior to the date of termination." (R. II, 267).

* * *

"Q. (By Mr. Howell) Did you prepare any schedule of accounts to send in to Commercial Credit?
A. * * * if they were still selling merchandise, it would be reasonable that *I would*, to make good any shortages, to *accept additional accounts in replacement.*" (R. II, 319).

* * *

"Q. Well, that was not taken in payment of a debt, was it?
A. * * * I don't know what it was, but that's what we did." (R. II, 336)

* * *

"Q. If you had an account for $10,000, which was not paid or which was returned merchandise, and a new account for $10,000 came in while you were there, *you substituted a new account of $10,000 for the one that returned merchandise or hadn't paid off, wouldn't you?*
A. *We accepted the new account, advancing no funds against these.*" (R. II, 339).

Respondent's representative, Weber, testified:

"The Witness: A. I myself did not see any schedules. I had requested schedules to cover accounts that we did not consider good, and I was given schedules by the Howard Distributing Corporation." (R. II, 377).

would have been the same as it had already accomplished by crediting the remainder of such accounts as "money paid by Howard Corp."[21]

The opinions of the Court of Appeals are self-evident that it completely departed from the accepted and usual judicial proceedings by, (1) accepting evidence favorable to the appealing party instead of viewing the evidence in a light most favorable to the party prevailing in the District Court, (2) placing the burden upon the party prevailing in the District Court of showing there is an evidentiary basis to sustain the findings reached by the jury rather than requiring that the appellant carry the converse burden, (3) substituting fact-findings and conclusions that are contrary to those found and drawn by the jury from conflicting evidence, (4) substituting its interpretation of

---

21. Respondent's accountant, Rossiter, testified:

"Q. Now, I ask you whether or not the ledger sheet reflects that after August 26, 1953, the Commercial Credit credited Howard Distributing Corporation with the accounts receivable which were assigned to it after August 26, 1953, which you say amount to $56,879.53?

A. *They were*—included in that figure are those four checks, which are the accounts relating to those four checks, which were drawn after the 26th of August

Q. I understand that, sir.

A. And if the issuance of *those four checks* is considered as crediting Howard Distributing Corporation, then they *were credited*.

Q. *Well, what about the remainder of the accounts?* Doesn't that ledger sheet reflect that the remainder of the accounts were likewise credited?

A. *They were credited.*" (R. III; 685)

• • •

"Q. *Well, so far as your accounting was concerned*—I am not talking about what your accounting shows; I am talking *about what that ledger sheet shows—whether they had ever charged them or not, they gave them as credits on the ledger sheet, did they not?*

A. *Well, the credit was to Commercial Credit's cash account*

Q. That's right.

technical accounting records and procedures for those testified to by the person charged with keeping the records and by expert certified public accountants, and (5), reversing the judgment on conflicting conclusions derived from the same facts.

Phoenix Indemnity Co. v. Girouard, 252 F.2d 146 (C.A. 5-1958); *Millers' National Insurance Co. v. Wichita Flour Mills Co.*, 257 F.2d 93 (C.A. 10-1958), in which latter case it is said:

A That's right. *They appear as credits to Commercial Credit's cash account on the ledger sheet.*

Q In other words, *they are cash credits, aren't they?*

A *To the cash of Commercial Credit.*" (R. III. 692)

* * *

Q They could have just as well issued checks for the full amount, could they not?

A What full amount?

Q Well, the entire fifty some odd thousand dollars that they received after August 26, 1953 that you testified to, could they not?

A That could have been done." (R. III. 739-40)

* * *

Q So it amounts to the same thing, does it not, they just never got around to reducing those in the reserve adjustment to cash, did they, as they did on those three?

A That's right. (R. III. 740)

Respondent's Vice-President, Rogers, testified:

"Q All right, sir. I now hand you three checks, or refer you to three checks which I believe you are familiar with. Will you identify those, the last check, those three checks, please sir, starting with the first one I point out to you?

A Which is the first one, Mr. Howell, the number?

Q This check here, number—

A C-8692

* * *

Q (By Mr. Howell) I will ask you the dates on those checks please, sir?

A C-8692 [illegible] September 28, 1953, C-8673 is dated September 23, 1953, and C-8[illegible] is dated September 22, 1953.

Q I ask you if those checks were ever actually delivered to the Howard Corporation or whether or not they were merely

"The appellate court takes the view of the evidence most favorable to the prevailing party and will uphold the verdict if there is substantial evidence to support it."

In *Hedger v. Reynolds*, 216 F.2d 202 (C.A. 2-1954), the court held

"The burden on an appellant, who seeks to reverse a judgment for error in fact, to show that essential findings are clearly erroneous, is, indeed a heavy one when, as in this instance, decision must turn largely upon the credibility of witnesses the trial court saw and heard testify. Rule 52 (a), F.R.C.P., 28 U.S.C.A.; United States v. Aluminium Company of America, 2 Cir., 148 F.2d 416, 433; Moore v. Ford Motor Co., 2 Cir., 43 F.2d 685."

run through your books, and the Howard Distributing Corporation credited with the amount of these three checks?

"A *Those three checks actually never were sent to Howard Distributing Company. We ran them through our bank and credited their account with them.*" (R. III, 451-2)

Respondent's officer-in-charge of the record, Kratz, testified

Q. Now, I will ask you if on the last trial of this cause when we were talking about this same situation, that you didn't testify that on each of the accounts which were assigned to you after August 26, 1953, you either got checks or gave cash credit for [illegible]

A. Well, I know we [illegible] issued checks for credits went into the reserve adjustment [illegible]

Q. *And you issued your checks for those, did you not?*

A. *Yes, sir.*

Q. *And you could have done just as well and issued checks in the remaining of the accounts, which were assigned after August 26, 1953, on which you paid no money to Howard, couldn't you?*

A. *Yes, that could have been done, and the checks kept and credited to reserve, but it would be the same result, I suppose.*" (R. IV-867-91)

Error of District Court in Holding Guarantor Liable on His Guaranty.

9. The contract of guaranty was joint and several. It was executed by William R. Sorgel, Dorothy L. Foster and Robert Howard and was to be construed and governed according to the laws of the State of Illinois (R. I. 136-8).

All three of the guarantors were sued by Respondent (R. III. 584-7).

Prior to trial, the District Court entered its order granting Respondent's motion to dismiss the defendant-guarantors, Dorothy L. Foster and Robert Howard, from the case with prejudice, at Respondent's cost. This motion to dismiss his coguarantors was objected to, and contested by the remaining guarantor, William R. Sorgel (R. I. 3; VI. 1375).

This error was put to, and overruled by, the Court of Appeals, citing as authority for its action §123, *Restatement, Law of Contracts* and §135, *Restatement, Law of Surety*. It refused to follow the law as announced by the courts of Illinois in *Rice v. Webster*, 18 Ill. 331 and *Clark v. Mallory*, 56 N.E. 1099, in which latter case the Supreme Court of Illinois said:

> "We think the instrument which plaintiff in error admits he executed is a plain, absolute, unconditional and unambiguous release of a joint debtor * * *, and, being such, operates in law to discharge the coobligor. Earnscleugh v. Lawarance, supra; Winslow v. Leland, 128 Ill. 304, 21 N.E. 568."

In *U. S. v. Warner*, 211 F.2d 669, the Seventh Court of Appeals in a case arising in the State of Illinois, involving the application of the law of that State as to the effect of a release of one of two joint and several obligors for taxes assessed on distilled spirits under 26 U.S.C.A., §2800

(d), held that, under the Illinois law, the release of one "joint and several" obligor released the other:

> "The common law rule is that a release of one of two or more joint and several debtors releases all unless the creditor reserves his rights against those not expressly released. 76 C.J.S., Release, §49, page 678. The Illinois courts have apparently followed this rule, but not without exception."

The Court after discussing the decisions of the Illinois courts on this question, including those cited hereinabove, proceeded to hold:

> "But here the Federal law in describing the liability simply provides that it should be 'joint and several', words which then had an established and definite common law meaning. In the section governing the compromise of such liability Congress could have provided, but did not, that the release of one of the obligors should not discharge the other. *We must therefore look to the common law to determine the effect of the release of less than all of the several joint obligors. From our investigation of the common law, with which the Illinois decisions seem to be in substantial agreement, we are convinced* that in this case *if the release* of Braverman *was without any savings clause to show that the intention of the parties was to keep alive the liability* of Wainer, *the release of Braverman must be considered as also releasing Wainer.*" (Emphasis added)

The decision in *U. S. v. Wainer, supra*, is in accord with the decisions of the Illinois courts holding that the release of a "joint and several" guarantor over the objection, or without the consent of, the coguarantors operates to discharge all. The decision under attack is in direct conflict with the decisions of the courts of Illinois and the decisions of the federal courts applying the law of that State

to the release of one of several "joint and several" guarantors.

10. At the time of the execution of the Commercial Credit-Howard Corp contract by the officers of Howard Corp and prior to Commercial Credit accepting the said contract, the latter required and caused to be adopted a resolution by the board of directors of Howard Corp (R. I, 168-9). This resolution (R. I, 170), provides that Howard Corp had entered into a contract with Commercial Credit:

> "For the *sale* of certain accounts" etc., "herein called 'Instruments', * * *, which contract has been read and examined by the Directors of this corporation.
>
> "That the said contract be and is hereby approved and the action of the Officers of this Company in making said contract on behalf of this Company is hereby ratified and confirmed. * * *
>
> "*That any Officer of this Company be and is hereby authorized* to execute any future contracts with said Commercial Credit Corporation, and on behalf of this Company, *to execute any schedules, assignments and or endorsements of instruments, transferring all right title and interest of this Company in and to all Instruments sold or to be sold to Commercial Credit Corporation under the aforementioned contract* * * *" (Emphasis added).

This resolution and the contract, as signed by the officers of Howard Corp, together with the executed guaranty were delivered to and considered by the credit committee of Commercial Credit in determining whether the proposed contract with Howard Corp should be accepted (R. II, 254-6). All of which was prior to the acceptance of said contract by Commercial Credit on April 28, 1953 (R. II, 278-80).

The record does not reflect that any other or further resolutions, in respect to the contract, were adopted by the board of directors of Howard Corp.

Nor does the record show that the officers of Howard Corp were vested with any authority from the directors of that corporation to contract with Commercial Credit except as is specifically granted in the resolution, dated April 17, 1953, viz., "for the *sale* of accounts", etc., and to execute certain documents "transferring all right, title and interest of this Company in and to all instruments *sold or to be sold to Commercial Credit Corporation.*"

The District Court found and held that, as a matter of law, the Commercial Credit-Howard Corp contract, dated April 17, 1953, was one for loans upon the accounts assigned to Commercial Credit by Howard Corp (R. I, 95). The Court of Appeals affirmed (*post*, page 3a).

Both parties plead (R. I, 6, 36, 40), and the undisputed evidence showed, that the Howard Corp was organized and chartered under the laws of Texas (R. III, 599-613).

The Petitioners affirmatively plead the invalidity and unenforceability of both the principal contract and the collateral guaranty obligation by reason of the lack of authority of the officers of Howard Corp to enter into a contract with Commercial Credit to pledge and make loans upon the corporation's accounts receivable; and, that Commercial Credit had knowledge of the limited authority of the officers and agents of Howard Corp prior to acceptance of the principal contract (R. I, 32-3).

This defense was duly urged in Petitioners' motions for directed verdict made at the close of plaintiff's testimony and again at the close of all the evidence, and same

was overruled by the Trial Court (R. VI, 1386, 1374, 1376-7). It was put to the Court of Appeals by Petitioners' first specification of error on cross-appeal and denied without comment (*post*, pages 1a-42a).

The Howard Corp being a Texas corporation the management of its affairs was governed by the laws of Texas. *Art. 1327, V.A.T.S.*, Directors' powers, provides in part:

> "The directors shall have the general management of the affairs of the corporation. * * *."

It is the rule in Texas that the borrowing of money and methods of obtaining loans are affairs of the corporation of which the directors have the control. *Cameron v. First National Bank*, 194 S.W. 469 (err. ref.), wherein the Galveston C.C.A. applies *Art. 1327* to that rule:

> "The borrowing of money in conducting the business of the company and the means and method by which the necessary loans could be obtained were certainly affairs of the corporation committed by the statute to the management of the directors * * *."

The board of directors of the Howard Corp, acting in accordance with the above statute as construed by the courts of Texas and pursuant to a requirement of Commercial Credit, adopted the resolution defining the contractual authority of its officers. The language used in the resolution is clear and precise. It is not appended with, nor perverted by, the covinous wordage and deceptive phraseology as are used in the principal contract.

The Supreme Court of Texas, by dismissal of application for writ of error, approved the holding of the Ft. Worth C.C.A. in *R. R. Spencer & Co. v. Thorp Springs Christian College*, 41 S.W.2d 482, wherein the authority of an officer of a college, a corporation, to execute a note on

behalf of the college was placed at issue. The Court in holding that such officer lacked the authority to bind the college, said:

> "In the case of Vacarezza v. Realty Industrial Co., (Tex. Civ. App.) 165 S.W. 516, 517, the court in its opinion, among other things, said:
>
> 'A corporation, being a creature of the law, must act and be bound as the law provides. Parties dealing with it are charged with the duty of knowing this. They must know that whatever power the agent has is derived from the board of directors.'"

The fact that the resolution states the directors had read the contract prior to passage of the resolution would be immaterial in light of the testimony of Respondent's officers that the directors could not determine the contract to be a lending device from reading same (R. I. 178-87, II. 322-4) and the testimony of one of the officers and directors of Howard Corp that he understood, from reading the contract, that it was for the sale of accounts receivable (R. V. 1224-7). The jury accepted this evidence by its answer to Issues Nos. 6, 7, 8 and 9 (R. I. 50-2).

This resolution must also be viewed in the light of Howard Corp's official application to Respondent for the latter to, "enter into a *contract to purchase* accounts receivable". (R. II. 259; emphasis added).

Right of the Court of Appeals to Direct Entry of Judgment for Respondent Where the Evidence Establishes That Some Money Was Owing on the Counterclaim.

11. The conclusion is inescapable that, under the criteria for determining whether Howard Corp. was indebted to Respondent, or vice versa, when the contract

terminated, the evidence was conflicting on the amount due as principal at that time (*ante*, page 17) and was likewise contradictory as to the correctness of the debit-entries in respect to the alleged n.s.f check and the balance due on the Skillern & Son and Ward Drug accounts (*ante*, pages 20-30).

Regardless of which sum the jury selected from the conflicting evidence as being the amount of principal owing at termination of the contract (footnotes 6-9, *ante*), it necessarily found by its answer to Issue No. 1, that Respondent's officer charged with keeping its records and those records were not worthy of belief, the entry pertaining to the alleged n.s.f. check was erroneous or fictitious, that Commercial Credit could have, but did not, collect the $1,409.18 from Ward Drug and the amount owing on the Skillern & Son account was $384.60 instead of the $32,500.53 claimed by Commercial Credit. The Court of Appeals therefore, did not have the right to set-aside the conclusions of the jury that nothing was due Respondent from Howard Corp and conversely that it was indebted to Howard Corp when the contract and guaranty terminated (Issues Nos. 1 and 19).

The jury's findings that nothing was due Respondent from Howard Corp, *as of April 30, 1958*, is also sustainable for the reason the jury in arriving at such answer found, *ex necessitate quaere*, that included in the principal sum of $41,790.12, Respondent contended was owed to it by Howard Corp, was 80% of the outstanding accounts receivable for which Howard Corp received no payments and that included in the $39,739.87 of service charges, Respondent's accounting-witnesses testified was due it from Howard Corp on April 30, 1958, was interest on the $19,579.81 it had recovered and applied as a payment on July 12, 1954.

12. There is a further item which entered into the jury's deliberations that was not considered or even mentioned by the Court of Appeals, from which the jury could conclude that Commercial Credit's records were not worthy of belief and which, with what has been shown, should decisively convince this Court that the Court of Appeals in reversing the judgment of the District Court and directing entry of a money judgment for Respondent deprived Petitioners of the rights guaranteed to them by the Seventh Amendment to the Constitution.

Merchandise of the invoice value of $68,445.56 was returned by account-debtors, placed under the control, and stored in various warehouses by and in the name of Commercial Credit (R. II, 268-70, 361, 380-3; IV, 890, 902, 905, 907). Respondent admits this fact (page 49 of its first brief in the Court of Appeals). This returned merchandise was turned over to, and stored by, Commercial Credit during the period from August 26, 1953, to December 4, 1953, and all of it was moved to, and concentrated in, the Texas Bonded Warehouse, San Antonio, Texas, prior to the judicial sale (R. I, 13; II, 382-3; IV, 890). This fact is also admitted by Respondent (pages 31-2 of its reply brief in the Court of Appeals). There can be no factual dispute about Respondent exercising absolute control over such merchandise to the exclusion of Howard Corp and Petitioners (R. IV, 882; V, 1082-3, 1090-4).

Upon application of Respondent, all of the merchandise, then on hand, was sold at a judicial sale on March 2, 1956 (R. V, 1216-17).

Montag testified, and his is the only evidence on the matter, that Commercial Credit had remaining on hand at the time of, and which was sold at, the judicial sale,

only $42,013.93 worth of such returned merchandise (R. V. 1130-2).[22]

The only withdrawals shown to have been made from the returned merchandise are the sales covered by the invoices in Assignment No. 1427, dated October 26, 1953, of $30.09 (R. V. 1139) and in Assignment No. 2619, dated December 4, 1953, of $670.10 (R. V. 1140), totaling $637.19.

The difference between the total amount of merchandise turned over to, and stored by Commercial Credit, and the amount thereof it had remaining at the time of the judicial sale was $26,431.63; of which only $637.19 is accounted for, leaving $25,794.44 of such merchandise for which Commercial Credit made no accounting or explanation. The records of Commercial Credit, placed in evidence, do not show the manner by which it disposed of this "unaccounted for" merchandise or the amount Respondent received therefor, nor are any credits for same given therein to Howard Corp (R. III, 649-63), although its officer,

---

22. "Q. Do you have a copy of the notice of sale which was published in this case upon the judicial sale of E-Z Rid and Fab Spray?

A. Yes, sir.

Q. Have you checked that against the records of the Howard Distributing Corporation as to what those products listed therein were being sold for through the year 1953?"

* * *

A. You mean the total amount of all of it?

* * *

Q. * * * well, yes. First, I am asking you if the records reflected that Howard was selling the various products for during the year 1953, that is, pressurized cans of Fab Spray, quarts, and so forth?

A. Yes, sir.

Q. All right, sir. Now, what did the total of the merchandise which is listed in that order of sale * * *?

A. The total of the items would amount to $42,013.93.

Q. Of all of the items?

A Of all the items."

Kratz, testified Respondent maintained records of the returned merchandise (R. IV, 838-9, 878).

When this discrepancy was once established the burden was upon Commercial Credit to account for this $25,794.44 of merchandise or explain its inability to do so. And having failed to do either, the jury had an additional evidentiary basis from which it could conclude that nothing was due Commercial Credit from Howard Corp. but conversely it was indebited to Howard Corp.

Summary.

Obviously the Court of Appeals either decided to ignore the evidence favorable to Petitioners, or chose to disbelieve it, nor did it apply the proper legal test to the standard of proof necessary to sustain the verdict of jury and the judgment rendered thereon. In *Revlon, Inc.*, v. *Buchanan*, 271 F.2d 795 (C.A. 5, 1959), that Court held:

> "The quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure and the decisions of the courts of the United States. White v. New York Life Ins. Co., 5 Cir., 1944, 145 F.2d 504; Wright v. Paramount-Richards Theatres, 5 Cir., 1952, 198 F.2d 303; Reuter v. Eastern Air Lines, 5 Cir., 1955, 226 F.2d 443; and Continental Casualty Co. v. Holmes, 5 Cir., 1959, 266 F.2d 269; and cf. Dick v. New York Life Ins. Co., 1959, 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935."

The opinions of the Court of Appeals are, *per se*, ample proof that the Court of Appeals chose to ignore the restriction placed on it by the United States Supreme Court and reweighed the evidence in order to arrive at conclusions different from those drawn by the jury. In *Sentilles* v. *Inter-Carribean Shipping Corp.*, 361 U.S. 107, 4

L. Ed.2d 142, 80 S. Ct. 173 (November, 1959), this Court restated the very substance of jury trials guaranteed by the Seventh Amendment. The function of the jury is said to be:

> "To select from among conflicting inferences and conclusions that which it considers most reasonable;"

as to the power of appellate courts, it was said:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It is also apparent, from what has been demonstrated, that the decision of the Court of Appeals is in conflict with the decisions of this Court and other Courts of Appeals, as well as its own decisions on the principles of law here involved, and that it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Rule 19-1(b), Supreme Court Rules.

CONCLUSION.

For the reasons advanced above, a writ of certiorari should be granted.

Respectfully submitted,

LEON P. HOWELL
1412 Alamo National Building
San Antonio, Texas
Attorney for Petitioners

BRADFORD F. MILLER
519 Majestic Building
San Antonio, Texas
Of Counsel

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17901

COMMERCIAL CREDIT CORPORATION,
Appellant and Cross-Appellee,

versus

WILLIAM J. SORGEL, Executor of the Estate of WILLIAM R. SORGEL, Deceased, and DOROTHY L. FOSTER,
Appellees and Cross-Appellants.

(AND REVERSE TITLE.)

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas.

(January 18, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

TUTTLE, Circuit Judge: Commercial Credit Corporation sued William J. Sorgel[1] on a personal guaranty for the sum of $94,443.62, together with attorneys' fees. As appellant here, it appeals from a judgment entered in favor of Sorgel and his daughter, Mrs. Foster, against it for the sum of $24,318.14.

---

1. Sorgel has since died but the action continues against his estate.

The suit was filed on a written guaranty under the terms of which Sorgel, a stockholder of Howard Distributing Corporation, unconditionally guaranteed "full and prompt performance" of a contract between Howard Distributing Corporation and Commercial Credit Corporation, executed previously thereto, under which Commercial Credit undertook to advance money on accounts receivable from customers of Howard to be assigned to it. By its terms the contract was to be construed by the laws of Illinois where it was executed. This contract of guaranty contained the following provisions:

> "This shall be a continuing unconditional guaranty and indemnity, and shall not be limited to any specific sum. Notice of acceptance of this guaranty and presentment, protest and demand, and notice of protest and demand of any accounts, and notice of any non-performance or breach of said contract by customer [Howard], and all other notices to which undersigned [Sorgel] might otherwise be entitled, are hereby waived."[2]

---

2. Much of the trial record was taken up by efforts of the appellees to challenge action or failure to act on the part of Commercial Credit, as to which the following provisions expressly relieve it of any obligation or responsibility:

> "* * * Commercial Credit may compound, compromise and adjust any claim against Customer or any debtor on any Account, or grant any indulgences whatsoever to Customer or any debtor, without the consent of Undersigned or giving notice thereof to Undersigned. This guaranty and indemnity shall not be affected, impaired or diminished because any Accounts, documents, invoices or other paper writings are invalid, forged, fictitious or incorrect, or by the failure of any verification or examination of Accounts or books of Customer to disclose any irregularities or wrong-doings of Customer, or by any act of commission or omission by Customer or by any changes in the terms of the Contract, or in the amount of advance on the purchase of Accounts or in the rate of charges that may be agreed upon by Commercial Credit and Customer. Undersigned will jointly and severally pay and perform their obligations under this guaranty and indemnity upon demand,

The defendants resisted the suit on several grounds They first contended that agents of appellant had represented to Sorgel that the financing agreement was not a loan but was a contract for the purchase of accounts. They then asserted that Sorgel would not have entered into the guaranty agreement at all except upon reliance on such statements.

Unless amounting to such actionable fraud as would require the setting aside of the contract, proof of such representation would be unavailing as being merely an attempt to vary the written agreement by parol. These representations consist of two statements which Sorgel said were made to him several days before he signed the guaranty agreement: "When I went to the office they told me that they *could* not loan money on accounts receivable in Texas because the laws of Texas would not permit them to charge enough interest;" and "They advised me they were ready to enter into a contract to purchase the accounts receivable of the Howard Distributing Corporation." It is not disputed that thereafter the contract was shown to Sorgel and he read it before signing his guaranty.

---

without requiring any proceedings to be taken against Customer or any debtor."

Much testimony was received also with respect to the nature of the financing agreement—that is whether it was an agreement by Commercial Credit to lend money to Howard on the security of accounts receivable or was an outright purchase of such accounts with agreement to repurchase. This Court having previously held as a matter of law that this contract was a loan contract, *Blackford* v. *Commercial Credit Corporation*, 5 Cir., 263 F.2d 97, all of the evidence and discussion of this matter on the trial below added nothing but confusion and thus made more difficult the task of the jury in isolating the true issues properly to be considered by it.

It is the contention of appellees that the first statement was false, because it has been held that this contract *is* a loan contract, and thus the company *could* make loans in Texas. In submitting the special issue on this point to the jury over appellant's objection, the question was phrased: "Do you find * * * that [appellants] represented to Sorgel, prior to his signing the guaranty * * * that plaintiff *would* not make loans upon accounts receivable *originating in* Texas." (Emphasis added). This is obviously an entirely different question and is clearly not supported by any evidence whatever. No finding of fraud could be predicated on a jury's finding that appellant represented it *would* not loan money on accounts *originating* in Texas, whereas the only evidence touching on the point was to the effect that the representation had been that appellant *could* not loan money on accounts receivable *in Texas* because the laws, etc." This is an entirely different type of representation. What was actually said, as we must find on conflicting evidence for the purpose of this appeal, was the expression of a *legal opinion*.[3] The representation the jury found to have been made was a statement of *intent* or *purpose*.

So, too, with the submission of special issue number 6, the jury found that appellant represented the financing contract "to be one for the *absolute* sale of accounts receivable and the *merchandise evidenced thereby*." (Emphasis added). There is, again, absolutely no evidence to support such a finding. Sorgel did not testify that it was represented to him that the contract was for the *absolute* sale of the accounts, and nothing was said at all about *sale of merchandise*. The great significance of this is that

---

3. This opinion may be literally a correct one, according to a reasonable construction of the words used, but we do not pursue this point because it was not argued by counsel.

this contract *was* a sale of accounts receivable. The statement made, then, was a *true* rather than a false statement. The fact that it was a sale only to secure advances does not turn the representation that "they were ready to enter into a contract to purchase the accounts * * *" into a false statement on which a charge of fraud could be predicated.

What has been said as to each of these two statements is entirely aside from the fact that, even assuming them to be statements of fact and to be false, there is no allegation or proof that the person making the representation made a false statement knowing it to be false. No such knowledge can be presumed. "Fraud is never presumed, and the burden is on [the party asserting it] to prove it with reasonable certainty by a preponderance of convincing evidence." *Roosth* v. *Lincoln National Life Insurance Co.*, 5 Cir., 269 F.2d 171. No effort was here made to make such proof.

It is also extremely doubtful whether such statements could under any proof of knowledge be a predicate for fraud. "As a general rule, fraud cannot be predicated upon mere statements of opinion as to matters of law, especially where the statements are made by one in his avowed capacity as adversely interested." *Meacham* v. *Halley*, 5 Cir., 103 F.2d 967, 972. See also *Mutual Life Ins. Co.* v. *Phinney*, 178 U.S. 327. In *Reighley* v. *Continental Bank and Trust Co.*, 61 N.E.2d 29, 33, the Supreme Court of Illinois (the state of the construction of the contract) said:

> "When two parties enter into a contract, and make it determinable by the law of another state, it is conclusively presumed that each of them knows the law in respect to which they make the contract * * * and that neither one could be misled by any statement in respect thereto on the part of the other."

We conclude that no defense of fraud could be predicated on the asserted representations, both because of what we have said above and because of the fact that on this record it is apparent that such representations were not material. Appellees do not even contend they did not understand the rights and obligations of the parties to the financing contract. It is entirely immaterial whether they assumed to guarantee the performance of those obligations because they thought it was legally known as a loan contract or thought it was a contract of purchase and repurchase.

The next defense; and the only one of substance in light of what has heretofore been said, was that on September 25, 1953, the date on which the contract between Howard and Commercial Credit was terminated,[4] Howard not only did not owe Commercial Credit any sums, but, on the other hand, the latter was indebted to Howard in the sum of approximately $70,000. It was on the basis of this asserted claim that Sorgel and his daughter, as stockholders of Howard, asserted the counterclaim which resulted in a jury verdict and judgment in their favor.[5]

The case thus went to trial on the one substantial issue: What amount, if any, was Howard obligated under

---

4. The contract was terminated by the giving of thirty days' notice signed August 26, 1953, as provided under the terms of the contract itself.

5. It will be noted that the counterclaim asserted by Sorgel and Mrs. Foster was predicated upon their right as stockholders of Howard to make such claim on behalf of the corporation which had since been dissolved, they suing on a derivative right. The several legal questions concerning the correctness of the trial court's order permitting such a counterclaim and the right of the individuals to receive for their own benefit the amount found by the jury to be due the Howard Corporation, need not be considered by us in light of the disposition which we make of the case.

its contract with Commercial Credit to pay it on September 25, 1953, the date of the termination of this contract[6] and what additional credits and debits arose subsequent to that date?

The appellant made out its prima facie case by introducing its original ledger sheets which showed the total amounts of cash advanced by it to Howard; the amounts which it had recovered from the accounts assigned to it by Howard, leaving a discrepancy on July 12, 1954, nearly a year after the cancellation, during which time Commercial Credit continued to make collections which it applied to reduce the debt balance, of $41,790.12; to this was to be added the service charge as provided for in the financing agreement, plus expenses incurred by Commercial Credit, which total figures, as testified to by appellant's accountant witnesses, equalled the sum of $94,443.62.

The defendants, in the trial court, relied upon three basic efforts to attack the correctness of this figure in order to defeat appellant's claim and build up their own counterclaim.

CORRECTNESS OF BASIC FIGURES.

The first effort was to make a vigorous attack on the correctness of the basic figures as shown on appellant's books. This was done by counsel's persistent cross-examination of the accountant and officer witnesses as to specific items, as to some of which no proof existed except

6. Sorgel also notified Commercial Credit on September 25th that his guaranty agreement was terminated as of that date. This, of course, would not affect any liability that had accrued under his guaranty up to September 25th.

the ledger entries themselves.[7] Counsel persists in this Court to attack the correctness of the basic figures.[8]

We think this will not do, since after all, the basic ledger sheets were introduced in evidence and it is clear that, whatever testimony was given by both the appellant's accounting witnesses and by appellees' one accountant witness, Montag, relating to what we have above referred to as the basic figures, is given from these ledger sheets. Moreover, as to them, Montag testified without

---

7. The basic figures, of course, are (1) how much was paid by Commercial Credit to Howard, (2) how much did Commercial Credit recover from the accounts assigned to it, or otherwise, from Howard, and (3) what was the average outstanding daily balance of assigned accounts "purchased" by Commercial Credit. The service charges could then be mathematically computed since the contract provided that they should amount to a fixed percentage of such average outstanding balance per day.

8. Pursuing this effort the brief states several times that appellant's witnesses testified as to certain figures which would either be favorable to appellees or be inconsistent with appellant's position, whereas such testimony was in fact based on certain assumptions counsel made in putting the question to the witness, or was merely explanatory of certain hypotheses. Two such instances are shown by the following statements in the brief:

> "Appellant's witness Rossiter likewise testified (R. 670-1) that he could reconcile with that of Mr. Montag, and, in so doing if the $13,098.94 check was included as a debit against Howard Corp., there would be, according to his figures, $7,597.46, as of September 25, 1953; but, if he excluded such check, then, as of that date, Commercial Credit was indebted to Howard Corp. for the sum of $5,492.48."

Reference to these pages in the record clearly demonstrates that Rossiter did not testify that on the assumption stated the accounts between the parties would stand either as $7,597.46 in favor of Commercial Credit or $5,492.48 in favor of Howard. Rossiter's testimony on pages 670-71 is an effort by him to explain the difference between his figures and an analysis made by appellees' witness. He does not testify that "if the $13,098.94 check was included as a debit against Howard Corporation there would

equivocation that there was no difference between him and Rossiter except as to their application. (See footnote 11, *infra*). This is substantiated by the fact that difference in treatment accorded by Montag to four items from that given to the same four items by appellant accounts to the penny for the jury's finding that Commercial Credit was indebted to Howard on September 25, 1953, in the sum of $2,595.98. Moreover, appellees' counsel, in his motion for a judgment based on the jury's verdict necessarily accepted the basis used by Montag in arriving at the figure of $2,595.98. It would, it seems, be inconceivable that appellees should be permitted to reject the very figures on which they requested and obtained a jury verdict and judgment in their favor.

Bearing on the question as to the correctness of the basic figures, however, there was one specific disputed item in the entries that entered into the final accounting on which Commercial Credit asserted an indebtness from Howard to it of $41,790.12.[9]

This one item represents an entry on the ledger sheet dated September 1, 1953, entered as a debit of $13,098.94, bearing an entry "Ck. Howard N.S.F." Montag, whose testi-

---

be, according to his figures $7,597.46 due Commercial Credit as of September 25, 1953." Furthermore, reference to pages 710-13 clearly shows that he did not testify that "if he excluded such check, then as of that date, Commercial Credit was indebted to Howard Corp. in the sum of $5,492.48." At that point in his testimony he was merely adding and subtracting figures at the request of appellees' counsel, repeatedly stating that the result was not what he considered to be due on the account. In referring to his computations, made at counsel's request, he refers to them as "in this tabulation" and "on this accounting."

9. For convenience this will be considered as the principal amount sued for, because it does not include service charge and expenses provided under the terms of the contract.

mony as an accountant witness was based exclusively upon his examination of the books, records and accounts of Howard and Commercial Credit long after the event, testified that he would not allow such a debit in his computations because there was no external evidence that such check had ever been issued by Howard and the check itself was not produced by Commercial Credit Corporation; that therefore there was not sufficient evidence that the charge-back was warranted. On the other hand, appellant's witnesses testified, and the books clearly disclosed, that on August 27, 1953, Commercial Credit had credited Howard with "cash received," of $20,708.28, on a remittance report No. 4529 from Howard, and that this remittance report included an itemized list of accounts totalling exactly $13,098.94. It was thus argued that there was convincing evidence that the charge-back was warranted by reason of the fact that credit for the identical amount had been given Howard on August 27th.

The issue as to the correctness of Commercial Credit's handling of this particular item was not separately presented to the jury, but the jury's finding that as of September 25, 1953, the balance in favor of Howard was $2,595.98 must necessarily have included acceptance by it of the appellees' treatment of this item. This is the only basic ledger entry which, in the present state of the record, appellees have saved their right to attack. In fact, Montag testified that if this entry was in error it was the only inaccuracy he had found in the books, reserving, of course, his opinion that other entries had been given the wrong legal effect. Appellees do not base this attack simply on its being an erroneous application of the sum of $13,098.94. They are forced to the position of asserting that this item is a completely fictitious entry, which resulted in increasing the charges against Howard by that

amount, since Howard's debit balance, as shown on the ledger sheet, was simultaneously increased to the extent of $13,098.94. This is not said in the sense that appellees have in any way asserted that the appellant's bookkeepers intentionally or wilfully falsified the account, but it is said for the purpose of distinguishing the nature of this attack from the others later discussed as to which the company's figures are accepted, but the effect to be given them is challenged. If appellees' contention respecting this item is correct, it would necessarily follow that the sum of $13,098.94 had been entered on the books of Commercial Credit Corporation as "Ck. Howard NSF" when no such item existed.

The ledger sheets introduced on behalf of appellant were admitted in evidence under the Federal statute, 28 U.S.C. §1732, which provides as follows:

> "§1732. Record made in regular course of business. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such

circumstances shall not affect its admissibility."

We are thus faced with the question as to whether absence of the original check, which, according to the entry, was returned for insufficient funds, together with the absence of supporting evidence as to the issuing of such check, creates an issue of fact on which the jury could decide that the entry was incorrect.

We think the correct approach to this problem is that announced by Wigmore

> "(1) The party's book being virtually his testimonial assertion (ante §1361), the rules for impeaching testimonial evidence (ante §§875-1087) so far as applicable, may be invoked * * *. In particular, the party's general character for veracity may be impeached; and the untrustworthiness of the book may be evidenced by demonstrating specific errors (ante §1030) in the entries." Vol. V, Wigmore, §1557.

Here there is no impeachment of the books. Appellees contend they impeached appellant's accountant witnesses by a few contradictory statements during the two trials and answers to interrogatories. This is not the issue. The question is: were the books impeached? Neither of these witnesses made the ledger entries. They are received in evidence on the presumption that appellant, using them in the regular course of business, caused correct entries to be made. Absent any proof that there were errors in other entries or affirmative testimony contradicting this specific item[10] we think the entry must be taken as a

10. The testimony of Bob Howard, presumably was available to prove the facts if the party desiring to attack an entry on the books sought to use it. True, there was some indication that he had left San Antonio, but no witness testified he had tried to find him without success

"testimonial assertion" by appellant not contradicted by appellees. The item must therefore be given effect as a charge against Howard.

ASSIGNMENT OF ACCOUNTS FOR "CREDIT".

The second effort of defendants was to contend that certain accounts receivable totalling $46,723.40, which were assigned after August 26, 1953, the date of the notice of cancellation thirty days hence, and as to which Commercial Credit made no payment to Howard, were accepted by Commercial Credit at the face amount of the invoices as cash, and that credits to Howard should have been increased in a corresponding amount. In response to a special issue presented to the jury it found that Commercial Credit had received this amount of accounts receivable at their invoice value as a payment on the balance due from Howard Distributing Corporation.

Commercial Credit objected to the submission of this issue to the jury, and urged before the trial court in its motion for judgment n.o.v., and urges here, that there was no evidence to support such a finding by the jury or that would warrant submission of such issue to it. We agree. Witnesses on behalf of the appellant who actually handled the affairs of Commercial Credit Corporation with Howard at the time of the contract's cancellation and immediately thereafter testified that accounts that were transferred by Howard to it after the notice of cancellation, and on which it advanced no additional funds under the financing contract, were assigned to it and received by it as additional security. *No witness testified to the contrary.* Neither the officers nor employees of the Howard Corporation were offered by defendants to contradict the course of dealing testified to by appellant's witnesses. The

latter testified that one of them, with Howard's permission, moved into the company's offices and assisted in making additional collections on all outstanding accounts, both those which had previously been assigned to Commercial Credit and those which were assigned subsequent to August 26th. Furthermore, he said he assisted Howard in the collection of accounts which had not even been assigned to Commercial Credit and all such collections were turned over to Howard and were not claimed by Commercial Credit. It was testified, without dispute, that all collection letters at least for the first several months after the cancellation, were sent out in Howard's name and Commercial Credit did not notify the account debtors that they had any interest in any of the accounts.

The only evidence on which appellees' theory is supported is testimony by its accountant witness Montag, which, in turn, was based upon his analysis of the books of Commercial Credit Corporation.

In order that his testimony can be understood, the following factual background must be stated: After August 26th, when notice was sent to Howard of the termination of the contract in thirty days, Howard assigned additional accounts receivable from its customers totalling $46,723.40 to Commercial Credit. No new money was paid to Howard on the assignment of these accounts. They were received according to the testimony of the employees of Commercial Credit who sent to San Antonio during the thirty day termination period to look after the company's interests, as additional security for advances previously made. This was the testimony of both W. F. Bracken, who went to Howard Corporation in San Antonio immediately following the notice of termination, and of Robert D. Weber, who succeeded Bracken and remained in the office of the Howard Corporation to see that such funds as were re-

ceived by Howard on assigned accounts were remitted to Commercial Credit. No affirmative evidence in the nature of testimony by either Bob Howard, the president and manager of the Howard Corporation, or of any other officer of that company, or either of the two women employees who worked with Bracken and Weber during this period of time was tendered to substantiate the contention that is now made that this item of $46,723.40 of additional accounts receivable assigned to Commercial Credit was accepted by it as cash for full credit on the outstanding debit balance due it by Howard.

Appellees' theory that Howard was entitled to credit, as for payment, to the extent of the face amount of these additional invoices depends upon Montag's analysis of the admittedly correct figures entered on the books of Commercial Credit. He supported this theory in two ways. In the first place he said that since the contract terminated on September 25, 1953, he considered that all accounts receivable then held by Commercial Credit and which were not then past due must be treated as cash because the contract had to be closed out as of that date. His second approach was that since the items totalling 80% of the $46,723.40 figure ($37,378.71) appeared on Commercial Credit Corporation's ledger sheet in a column headed "Credit" he deduced therefrom that this was evidence that Commercial Credit intended to give Howard credit for the face amount of the accounts as for cash. This column is part of the division set up as "Reserve Adjustment." It does not purport to be a general "credit" column for crediting the debtor's account. Clearly when Howard turned over these additional accounts which appellant was not "purchasing," the amount of these had to be entered somewhere on the books in order that when they were collected proper entries could be made. This

is where they were entered. As between being a debit item or credit item vis a vis Howard, obviously they were a credit item. No conclusion can be drawn from such entry that it was an agreed final credit as if in payment.

The Illinois courts have consistently held that where the relationship of creditor and debtor exists and the creditor holds security of the debtor, the receipt by the creditor of property from the debtor is not to be considered absolute payment except upon proof of an agreement to that effect. *Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 16 N.E. 923, 924; *First National Bank v. Village of Dolton*, 5 N.E. 2d 732, 734. Appellees seem to accept this principle of law by accepting as applicable what we said in the Florida case *Holcombe v. Solinger & Sons Co.*, 5 Cir., 238 F.2d 495, 500:

> "* * * The taking of a bill of exchange or promissory note for a debt will operate as payment if so intended. In many jurisdictions the receipt by the creditor of the instrument as payment will be enough. 70 C.J.S., Payment §23, p. 229. If such rule applied to the case before us there would be a further ground for holding the guarantor discharged as to the indebtedness represented by the trade acceptances. However, the Florida law requires that there be an express agreement that the giving of a negotiable instrument shall operate as a payment if it is to have that effect * * *."

The question then becomes one of proof of mutual intent to treat the accounts as actual payment.

Sorgel lays great emphasis on the provisions of the contract appearing as Second Section (1) as justifying a finding by the jury that Commercial Credit had accepted the accounts at their face value as absolute payment. This paragraph reads:

"Commercial Credit may hold for purchase or as security any accounts, property, securities or moneys of customer which may at any time be assigned to or delivered to or come into the possession of Commercial Credit, or may apply the same or the proceeds thereof to the payment of any amounts which at any time then or thereafter are or might be owing to Commercial Credit by customer * * *"

It is clear that this provision extends some kind of option to the creditor to hold such accounts "for purchase or as security" and to "apply the same or the proceeds thereof to the payment, etc."

Inasmuch as the contract between the customer, Howard, and Commercial Credit transferred full title which Howard owned in all assigned accounts to Commercial Credit,[10a] this provision in Second Section (1) adds little to the powers which Commercial Credit could exercise with respect to such assigned accounts. While it is not entirely clear what is meant by holding such accounts "for purchase," it is plain that this is not the equivalent of saying that the creditor could take absolute title to them no matter how much their face amount exceeded the balance owed by Howard. Neither can it be said that when Commercial Credit received and retained them its action in doing so bound it as by an election to take them at their face value in lieu of payment. Since the holding of the accounts by Commercial began as a holding as security, and

---

10a This provision is as follows:

"Customer warrants, guarantees, and agrees as follows: (a) Contemporaneously with the purchase of accounts, which shall be subject to and governed by this contract, customer shall execute 'Schedule of Accounts' or assignments so as to *vest in Commercial Credit full title to accounts*, and thereupon Commercial Credit shall become and be entitled to all of the ownership, title, rights, securities or guaranties possessed by customer in respect thereto and in respect to the property evidenced thereby." (Emphasis added.)

since this was the whole tenor and purpose of the security agreement, something more than an option to treat them as something different than security must be shown to convert such holding into payment. There is no evidence of an exercise by Commercial of any option to convert the accounts held as security into accounts taken at their face value as payment.

Similarly, there is no evidence that, assuming Commercial Credit had the right to apply the accounts *at any value it chose* to the payment of the indebtedness it had, merely by receiving and retaining these accounts, which, under the contract, it had the right to receive and retain as security, elected to apply them as payment.

We think that, notwithstanding the terms of this provision, it would be necessary for a supplementary agreement to be made between Howard and Commercial Credit before security title in the latter could be converted into absolute title in satisfaction of any particular amount of the indebtedness. Certainly it seems clear that if the debtor were here protesting that the accounts were worth more than the balance of the indebtedness, Commercial Credit could not rely simply on this paragraph of the contract to justify its absolute appropriation of the accounts. In the absence of some subsequent agreement or some measure of foreclosure of the security the title of Commercial Credit continued to be title for collateral purposes only and not in final payment of the account.

Montag's testimony that because the contract terminated on September 25th these accounts were thus converted into cash instead of security hardly merits consideration. The whole course of dealing between Howard and Commercial Credit contemplated the use of accounts receivable as security for the payment of the amounts due

under the financing agreement. This relationship was in nowise changed as to transactions arising before the date of termination merely because the contract had been brought to an end.

We conclude that there was no basis for the submission to the jury of the special issue as to whether Commercial Credit had accepted $46,723.40 worth of accounts receivable subsequent to August 26, 1953, to be credited upon Howard's account with it. This would eliminate a credit of $37,378.71 from the figures testified to by Montag and used in the jury's finding that on September 25th there was a net indebtedness of $2,595.98 due Howard.

A subsidiary item, treated by Montag in the same manner as he treated the item of accounts receivable assigned after August 26th was the method of his handling the balance shown on Commercial Credit Corporation's books in the contingent reserve account. This account consisted of 20% of the face value of accounts receivable assigned by Howard during the life of the contract. Commercial Credit advanced in cash 80% of the face amount of the accounts and entered the remaining 20% in a contingent reserve account. Whatever balance there was in this account would ultimately be paid to Howard if there were no sums due by it to Commercial Credit. Montag charged Commercial Credit, and gave Howard full credit, for the balance of $18,371.09, which appeared on Commercial Credit's books as representing 20% of the face value of accounts theretofore assigned. It was not disputed that this figure represented simply 20% of the face amount of certain accounts receivable and did not represent cash actually collected on the accounts. It should be noted that in arriving at its principal claim Commercial Credit gave full credit for cash actually collected on these accounts. A further subsidiary item in the same category was Montag's treat-

ment of an item of $1,828.90, which represented 20% of a small amount of accounts receivable assigned after September 25, 1953, which date was the date used by Montag in obtaining the figure of $18,371.09 above.

The significance of these specific items of $37,378.71, $18,371.09 and $1,828.90, is that, when added to the item earlier discussed as the "NSF" check for $13,098.94 and a debit against Howard of the September service charge, and an item of $2.88 telephone charge, are deducted the resultant figure lacks exactly $2,595.98 from coinciding with the figure of $67,355.55, which both sets of accountants agreed was a correct figure as to the balance due to Commercial Credit Corporation subject only to the treatment to be accorded to these four items.[11] This was the $2,595.98 which the jury said Commercial Credit owed Howard.

---

11. The following testimony of appellees' accountant witness Montag demonstrates clearly the basis for our conclusion that the parties differed at September 25th only with respect to the treatment of these four items:

"Q. [By counsel for appellant] Let me show you—I don't know whether you've seen it or not—a statement of account that was prepared by Mr. Rossiter, a certified public accountant from Chicago, from the books of the Commercial Credit Corporation. I'd like for you to go over that. Have you seen it before?

A. Yes, sir, I have seen it.

Q. Have you analyzed it?

A. Only at September 25th. I did not—I reconciled my figures with his figures only at September 25th. I did not go into those other dates.

Q. All right. You say you reconciled his figures with yours as of September 25th. Now, he shows as of September 25th that there's a large balance due to Commercial Credit Corporation by Howard Distributing Corporation; is that not correct?

A. That is correct.

Q. What is the balance that he shows due?

A. $67,355.55.

CREDIT FOR RETURNED MERCHANDISE.

The third effort by defendants was to charge Commercial Credit in the final settlement between it and Howard with a large amount of "returned merchandise" which had theretofore been invoiced to Howard's customers for the sum of $68,445.56 as payment on the account in the sum of $68,445.56. In order to understand this con-

---

Q. All right. Now, slowly tell me how you reconciled those two accounts; that is, your showing due by Commercial Credit to Howard of the $2,595.98, and his showing due by Howard to Commercial Credit Corporation of $67,000 some-odd.

A. Do you want the—I have the differences itemized. Do you want them or do you want his figure—

Q. Yes, give me the differences itemized.

A. I have taken credit for the journal entry reported to be an n.s.f. check in the amount of $13,098.94.

Q. You've taken credit—

A. For which I have no record.

Q. —for a check of how much?

A. $13,098.94.

Q. All right.

A. And eighty percent of the accounts assigned after August 26th, 1953, in the amount of $37,378.71.

Q. Yes.

A. The contingent reserve at September 25th, 1953, in the amount of $18,371.09. And twenty percent of the accounts assigned after September 25th, in the amount of $1,828.90. Now, you add those figures and deduct the September service charges in the amount of $723.23; and September telephone charges in the amount of $2.88—

Q. All right.

A. —which gives you a total of $69,951.53, from which you deduct the $67,355.55, and it will give you a difference of $2,595.98.

Q. In other words, Mr. Montag, there's no difference between you and Mr. Rossiter's figures. The only difference is in the way you treated them?

A. Application, yes, sir.

Q. The application of figures. In other words, there's no disagreement as to the basic books, but merely as to the method of applying.

A. That is correct."

tention, which was not supported by any entries on the books of Commercial Credit Corporation, and thus was not supported even by the accounting testimony of Montag as to its treatment by appellant, is that after the letter of August 26th and the arrival in San Antonio of Commercial Credit's employees, Bracken and Weber, to look after the interest of their employer in the office of Howard Corporation, a substantial amount of merchandise that had theretofore been the basis of accounts receivable from Howard's customers was being returned to Howard. It was originally placed in several different warehouses by the joint action of Howard and Commercial Credit. A substantial part of the warehousing fees were later paid by Commercial Credit and that Company also subsequently insured all of this merchandise. Both of Commercial Credit's employees testified that such merchandise as was thus taken into the custody of appellant was held by it as additional security.[12] There is no testimony by any of Howard's officers or employees that such merchandise

---

12. See the following testimony by Weber brought out by cross-examination:

"Mr. Howell: Q. I believe you just testified that the property that you repossessed, or that came into your possession, the accounts receivable, which had been purchased from Howard Distributing Corporation, you assumed was the property of the Howard Distributing Corporation at that time, is that correct?

A. My undestanding is this, Leon: that when the merchandise is taken back and put in the warehouse, as such, it was done by the client, and it was given to us to hold as collateral security, in trust, for the liquidation of the indebtedness, and if the indebtedness was liquidated and an excess arose from the liquidation, it would be paid to the client. If a deficiency arose, the client would pay Commercial Corporation.

Q. That was your understanding?

A. Yes.

Q. That was your understanding about the matter?

A. Yes."

or any part of it was taken over by Commercial Credit under an agreement by it, concurred in by Howard, that Howard was to receive credit for an amount in cash equal to the original invoices under which the merchandise had been shipped out to Howard's customers. To the contrary, the only testimony as to the dealings between Howard and Commercial Credit, other than what has already been stated, is to the effect that Howard stated that he would attempt to sell the goods and create good accounts for it which he would then turn over to Commercial Credit Corporation, and the testimony of appellant's employees in answering questions put to them by appellees' counsel on cross-examination, in which they repeatedly stated that the company was holding this property as security for its debt.[13]

The circumstances relied on by appellees to establish an agreement by Commercial Credit to accept the returned merchandise as cash payment on its claim against Howard is that Commercial Credit asserted dominion over it, paid warehouse charges on it, kept it insured, and in two or three letters seeking disposition of the merchandise by Howard or in correspondence with the warehouse, spoke of the merchandise as "ours."

What we have heretofore said as to what is necessary to convert the accounts receivable into a cash payment on an indebtedness applies with equal force here. There was no attempt made by appellees to show that either by word or conduct either Howard or Commercial Credit proposed that the merchandise be taken in lieu of cash; much less

---

13. An unsubstantial attack is made on this testimony by appellees by stating that, after vigorous cross-examination as to the meaning of "collateral," "security," "ownership" and "title" one of appellant's witnesses was unable to give a proper characterization of the quality of appellant's possession.

is there any effort to prove that *both* parties agreed to such a proposal. It is too plain to require comment that the exercise by a mortgagee or other lienholder of dominion over the mortgaged or pledged property, either for the purpose of insuring it or warehousing it or to obtain sales of it in cooperation with the pledgor or debtor, is entirely consistent with its position as a holder of security and does not convert its interest in the property to that of outright owner. Furhermore, there is nothing to warrant a conclusion that such ownership, even if taken outright, was on the agreed amount of the original $68,445.56, at which it had been billed to Howard's customers.

Both parties agreed that the face amount of the accounts receivable assigned after August 26th was $46,723.40. There was no proof as to whether or when, if ever, *the accounts receivable* represented by the $68,445.56 worth of returned merchandise (as distinguished from the merchandise itself) were assigned to Commercial Credit. It is mathematically certain that not more than $46,723.40 worth of them were so assigned because only that much in accounts were transferred after August 26th. It was proved without dispute that some of the merchandise was sold on accounts that were never assigned to appellant. The amounts or identity of such accounts were never proved. There was, therefore, no basis for submitting to the jury special issue number 10, or its finding that "the plaintiff, Commercial Credit Corporation, accepted the returned merchandise which was stored in its name in the various warehouses after August 26, 1953, in satisfaction of the accounts receivable represented by the invoice value [found by Issue No. 13 to be $68,445.56] of such returned merchandise."

One of the inconsistencies in appellees' theory of application of the accounts receivable item and the returned

merchandise item as credits in favor of Howard is that the evidence clearly shows that a substantial part of the merchandise was returned and warehoused during the month of September, 1953. Thus, assuming all of appellees' other contentions were correct, when they submitted issue No. 19, "what do you find from a preponderance of the evidence to be the amount of money, if any, due Howard Distributing Corporation from Commercial Credit Corporation, if any, as of September 25, 1953," and they received the answer "$2,595.98," appellees could, of course, not claim the advantage of any part of the $68,445.56 merchandise offset to establish a counterclaim *in addition* to the $2,595.98, because there is no proof as to how much of this merchandise was actually warehoused prior to September 25, 1953. Under appellees' theory all such was credited to Howard and was thus incorporated in the finding of the $2,595.98 figure in special issue No. 19. Nevertheless, appellees urged, and the trial court found for them, that they were entitled on their counterclaim to the sum of $21,722.16, as overpayment from Howard to Commercial Credit, this representing the difference between the $68,445.56 figure, which the jury had found Commercial Credit had accepted in payment of an equal amount of accounts, and the $46,723.40 figure which the jury found Commercial Credit had accepted in accounts in lieu of cash. Thus, even though we were not required to hold on this record that neither the merchandise nor the accounts transferred after August 26th were accepted by agreement of the parties as cash, we would be compelled to hold that there is no basis to support a finding by the Court, based on the jury's findings on the special issues that Howard was entitled to an additional claim of $21,722.16. This amount was necessarily already included in the computation of the balance due as at September 25th.

CREDIT FOR COMMERCIAL CREDIT'S "NEGLIGENCE".

Holding, as we do, that the application made by appellees' accountant witness as to all four items in dispute was not legally permissible on the record before us, and in light of the fact that but for these four items no attack is successfully made on the accuracy or correctness of the amount claimed to be due as a principal item under the contract, it is clear that the judgment would have to be reversed and, as to the principal amount, a judgment rendered for the appellant unless there is merit in appellees' further point—that is, that if the merchandise held by Commercial Credit was held as security for Howard's indebtedness, then appellees are nevertheless entitled to a credit in the sum of $68,445.56, because, while holding it as security, appellant was so negligent as to disposition of it for the benefit of all parties at interest that Sorgel was released as guarantor of Howard's account.

This contention must be viewed against the following factual background. Following the termination of the contract on September 25th Commercial Credit's employees were present in Howard's office attempting to collect the balance due their company; and in so doing they were doing all they could to collect, in the name of Howard Distributing Corporation, all outstanding accounts; merchandise was being returned as not satisfactory; Howard was unable to pay its debt to Commercial Credit;[14] Sorgel had become dissatisfied with Howard's operation and had filed suit against it; he and the Howard Corporation had made an effort to compromise their differences unsuccess-

---

14. There was no evidence to warrant the submission of Howard's ability to pay to the jury. The undisputed evidence was that it was unable to do so.

fully; then on October 23, 1953, Sorgel's counsel wrote appellant asking for a statement as to its claim against Sorgel.[15] Appellant responded, first, on October 26th, by making formal written demand on Sorgel and Mrs. Foster

---

15. This letter follows:

LEON P. HOWELL
Attorney at Law
1412 Alamo National Bank Building
San Antonio 5, Texas

October 23, 1953

Agreement and Contract October 12, 1953 and October 13, 1953, respectively, by and between William R. Sorgel, Sr. et al and Bob Howard et al

Mr. W. F. Bracken
Assistant Vice-President
Commercial Credit Corporation
222 West Adams Street
Chicago 6, Illinois

Dear Mr. Bracken:

Reference is made to the above agreement and contract with which you are familiar.

Mr. Howard and his associates have failed to perform said agreement and contract and are wholly in default thereon.

My clients, Mr. Sorgel and Mr. and Mrs. Edward L. Foster, have instructed me to immediately institute appropriate legal action to protect their interests, so if your company now considers my clents or either of them, liable to any degree or extent on the contract of April 17, 1953, between your company and Howard Distributing Corporation it is requested that you let me have a statement thereof prior to November 2, 1953, in order that same can be considered in conjunction with such proposed suit.

Sincerely,

s/ Leon P. Howell

(a co-guarantor) for the payment of $57,099.56," which amount it said was "presently past due and owing to us due by Howard Distributing Corporation," and, second, by writing Sorgel's lawyer on November 2nd, enclosing copies of the letters to Sorgel and Mrs. Foster.

The record is silent as to any request from Sorgel to Commercial Credit relative to the merchandise thereafter until after Commercial Credit had filed suit on the account in the state court in Wisconsin.

When demand was made in October, 1953, appellant had not yet paid for any warehousing or insurance on the merchandise. The testimony was that it was being put into the warehouses upon being returned by Bob Howard, acting in conjunction with Commercial Credit's employees who were then at his place of business.

Obviously, under universally established rules of law, Sorgel could have paid Commercial Credit the amount of

---

16. This letter was as follows:

October 26, 1953.

Mr. William R. Sorgel
838 West National Avenue
Milwaukee 4, Wisconsin

Dear Mr. Sorgel:

As a guarantor of our Accounts Receivable Contract with Howard Distributing Corporation, accepted by us on April 28th, 1953, we would advise you that there is presently past due and owing to us due by Howard Distributing Corporation the sum of Fifty-seven Thousand Ninety-Nine Dollars and Fifty-six Cents, ($57,099.56). Demand is hereby made upon you for the payment of said account.

Yours very truly,

H. Kratz
enl

Assistant Secretary.

A similar letter was sent to Mrs. Foster.

its valid claim (in the event it disputed the correctness of the account it could have made a tender of what was actually due) and have been subrogated to all the rights Commercial had as to all remaining unpaid accounts receivable and all merchandise of Howard Corporation, which it then held as security for its debt. Sorgel was at that time being fully advised by counsel who had already instituted one lawsuit for him against the Howard Corporation, and who had already made demands on Commercial for the filing of its claim. Sorgel, of course, is charged with notice that the contract he guaranteed contemplated that appellant would hold accounts and the goods they represented as security.[17] For him now to say that Commercial Credit's warehousing of this merchandise after Howard's warehousing payments had expired, paying insurance premiums for its protection and holding it secure except as against sales by Howard for good solvent accounts amounted to a failure of its duty to Sorgel as guarantor merely because it did not actually find purchasers for it before it became worthless,[18] is to put the cart before the horse. It was Sorgel's duty to pay the amount due and then take over the security if he wished to do so. We know of no rule of law that would require appellant at its own expense

---

17. The contract provided that Howard warranted, guaranteed and agreed as follows:

> "Second Customer warrants, guarantees and agrees as follows: (a) Contemporaneously with the purchase of Accounts, which shall be subject to and governed by this Contract, Customer shall execute 'Schedule of Accounts' or assignment so as to vest in Commercial Credit full title to Accounts, and thereupon Commercial Credit shall become and be entitled to all of the ownership, title, rights, securities or guaranties possessed by Customer in respect thereto, *and in respect to the property evidenced thereby*, including the right of stoppage in transit; . . ." (Emphasis added.)

18. It was finally sold at a judicially ordered sale and brought only a nominal amount.

and at its peril, to put on an active sales campaign to attempt to dispose of this returned merchandise. Moreover, the evidence is undisputed, although appellees' brief incorrectly states to the contrary, that appellant did try to sell the merchandise. Bob Howard, the manager and principal debtor, recognized its obligation to attempt to dispose of it and he at no time complained of Commercial Credit's inactivity thereabout. The only evidence by which appellees sought to create even an inference of negligence was appellant's failure to sell the merchandise while held by it. There is absolutely no proof to support appellees' contention that it would not have sold the merchandise at a fair price to any purchaser who sought to buy and have given credit for the proceeds of such sale on its claim against Howard. This claimed obligation of Commercial to attempt to sell the merchandise is even more than would be required of a surety. See *First National Bank of Fort Worth* v. *Brown*, 172 S.W.2d 151. There is no such standard of care required in the case of an unconditional guarantor. Thus, there was clearly no basis on which the trial court could submit an issue of negligence to the jury.

Moreover, there was a complete failure of proof as to the damages resulting from such conduct by Commercial Credit even had it amounted to negligence. The jury merely found that "Commercial Credit Corporation failed to use the degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances to sell the merchandise that was stored in the *Texas Bonded Warehouse* prior to the filing of the application for sale on October 19, 1955," and that "the actual value * * * of the merchandise stored in *various* warehouses in the name of Commercial Credit Corporation at the time it was so stored," (emphasis added) was $68,

445.56.[19] There was no issue put to the jury as to whether the failure of Commercial Credit "to use the degree of diligence that an ordinary prudent person would have exercised" was the sole or even a contributing cause to the loss of whatever value the merchandise in that particular warehouse had and even that figure was not proved. There was no effort to prove that by the exercise of the greatest diligence and care Commercial Credit would have been able to dispose of any, much less all, of the merchandise. There was no possible basis for these findings to warrant the conclusion that there was a negligent loss of $68,445.56, or any other specific figure.

We conclude that there is no defense of negligence in the handling by Commercial Credit of the stored returned merchandise in light of the nature of appellees' guaranty.

We find also that there was no basis for the trial court to submit to the jury a special issue relating to a demand by Commercial Credit on Howard when the contract was terminated. It is really without dispute that Commercial Credit made oral demands for payment. No written demand was required even under appellees' theory. The witnesses repeatedly stated that they claimed and sought to get the money from Howard when they were in his place of business assisting him with his collections immediately after the cancellation. It is manifest that Howard recognized its obligation to pay but was "unable to do so." Such course of dealing would amount to a waiver of demand. The law does not require a creditor to make a demand of a debtor who is admittedly unable to pay. There

---

19. It will be noted that the alleged negligence was found only as to that merchandise in one warehouse. It was clearly proved that there was goods stored in several warehouses and it was the total that was found to be worth $68,445.56

is, of course, no dispute about the demand being made on Sorgel within a month of the date of termination at a time when he could do whatever he felt advised to do for his protection. In his subsequent correspondence he did not contest the claim on the ground of a failure to make formal demand on Howard. This special issue should not have been submitted to the jury.

There remains the question as to the amount of service charge that is due under the terms of the contract. Appellees made the contention that the service charges were incorrectly figured, if any were due at all, because they were figured on the average of the outstanding balances of uncollected accounts receivable rather than on the principal amount due Commercial Credit Corporation. This is in substance what the contract provides for. The terms are:

> "At the end of each month Commercial Credit will bill Customer for charges in connection with the purchase of Accounts during such month, and Customer will pay said charges forthwith. Said charges shall be computed upon the basis of the average daily outstanding face of Accounts during such month, the charges to be determined by applying against such average daily outstanding face of Accounts the proper percentage shown below, depending upon the amount of the average daily outstanding face of Accounts during such month; provided however Customer agrees that the minimum charge to be paid Commercial Credit in any one month in connection with accounts outstanding during such month will be two hundred dollars ($200.00)
>
> | Average Daily Outstanding Face of Accounts During Month | | Rate Per day |
> |---|---|---|
> | (BH) | 0. to $25,000.00 | 1 30% |
> | (WFB) | $25,001.00 to $50,000.00 | 1 32% |
> | | $50,000.06 and over | 1 34%" |

As we have already indicated, Howard transferred a substantial amount in accounts receivable to Commercial Credit after August 26, 1953, for which Commercial Credit did not advance any additional money. It cannot be said, therefore, that such accounts were "purchased." Any construction of the language of the contract that would entitle the finance company to increase the base on which it computed interest or service charge merely because it received additional accounts as security for its advances would be extremely unrealistic. We think there is no doubt that the contract meant that the service charge should be figured on the average daily balance of accounts actually "purchased," or on which Commercial Credit had actually advanced 80% of the face value. We think it clear that the service charge was not so computed; and that the item of $39,739.87, claimed as service charge as of the date of trial, was substantially in excess of the amount authorized under the contract.

Appellees finally bring forward the contention that Sorgel has been released on his guaranty because, while he was sued together with his daughter and Bob Howard, all of whom signed the guaranty, appellant dismissed the suit with prejudice as to the other two defendants.[20] Thus, they say that Commercial Credit, in effect, released two of three obligors and thus released all. Whether the dismissal of the suit against two co-guarantors be viewed in light of the relationship of co-obligors under a simple contract or in light of the relationship of cosureties, we think the contention is without merit. If we consider the dismissal against Howard and Mrs. Foster as a release of two or three parties under joint and several obligations on a

---

20. Mrs. Foster filed a plea of coverture, asserting that under the Texas law she could not legally, as a married woman, guarantee the debt of another. Howard was not served

contract of guaranty, the true rule is as set forth in Restatement, Law of Contracts, Section 123:

> "Section 123. Discharge of Joint and Several Promisors. Where the obligee of joint and several contractual promises discharges a promisor by release, rescission or accord of satisfaction, the other promisors are to be discharged from their joint duty, but not from their several duties, except in the cases and to the extent required by the law of suretyship."

If we consider the dismissal of the suit against these parties as a release of two of three cosureties, we think the following rule would apply:

> "Section 135. Release by Creditor of One of Several Cosureties. * * * (2) Where the creditor releases one of several cosureties and as a part of the release reserves his rights against the remaining sureties, the release as such does not have the effect of discharging or reducing the obligations of the remaining sureties." Restatement of the Law, Surety, Section 135.

This provision is applicable here because, by insisting on the prosecution of its suit against Sorgel while dismissing as against the others, Commercial Credit clearly "reserve[d] [its] rights against the remaining sureties." In such circumstances the release did not in any way affect the liability of Howard or Mrs. Foster to respond to Sorgel in case he should seek contribution as against them. See Restatement of the Law, Security, Section 135, Comment on Subsection (2), page 367.

Finally we need not decide the question whether Sorgel and Mrs. Foster had the legal right to counterclaim on the basis of asserted overpayments of the Howard Corporation, because, on the record, we have found that no such overpayments could be found by the jury.

We have analyzed the issues, including the figures, in light of the testimony and lengthy arguments of counsel contained in the nearly 1500 pages of the record and more than 400 pages of briefs, reply briefs and answers and supplemental answers to reply briefs, and with the greatest difficulty have arrived at what we consider to be the grains of truth. They have been deeply hidden in much chaff. We conclude that such analysis, once made, shows that, without factual dispute, the principal sum of $41,790.12 was owed by Howard Corporation to Commercial Credit on July 12, 1954. We find no substantial issue drawn as to the debits or credits after that date except as to the computation of the service charge. The jury found the amount of attorneys' fees without reference to the amount of recovery. It is not contested. We hold, therefore, that on the record before us there was no substantial issue of fact as to appellant's right to recover the sum of $41,790.12, as principal amount due on July 12th, $13,013.63 expenses covered by the contract, and $23,000 attorneys' fees. There must still be determined the amount due as service charge. In the light of the standard which we have set out above, we do not perceive that there can be any issue of fact as to the amount of this charge. In view of the complicated state of the record, however, we do not determine as a matter of law that there is no remaining issue for jury determination on this feature of the case, but leave this for the trial court to determine.

The judgment is REVERSED and the cause REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17901

COMMERCIAL CREDIT CORPORATION,
Appellant and Cross-Appellee,

versus

WILLIAM J. SORGEL, Executor of the Estate of WILLIAM R. SORGEL, Deceased, and DOROTHY L. FOSTER,
Appellees and Cross-Appellants,

(AND REVERSE TITLE.)

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING.

(April 11, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

PER CURIAM: The appellees have filed a petition asserting sixty three grounds for rehearing. Substantially all of the matters raised by such motion were fully argued in the more than 400 pages of briefs originally considered by the Court. They will not be reconsidered in response to appellees' effort to re-argue on this motion.

There is one alleged incorrect mathematical computation, applying the facts to the legal principles announced by the Court, which we have perforce re-examined.

In our original opinion we stated that, "Without factual dispute, the principal sum of $41,790.12 was owed by Howard Corporation to Commercial Credit on July 12, 1954." Appellees attack this statement by showing that this figure included $7,315.57, which was 80% of $9,144.46 of accounts receivable assigned by Howard after September 25, 1953, the date of the termination of the contract, and for which Commercial Credit paid nothing. We held that these accounts were assigned only as additional security.

This item of $9,144.46 was part of a larger sum of $16,723.40, for which Sorgel claimed full credit. It was thus not pinpointed as a separate item for our consideration in light of the legal principles laid down by us in our opinion. Careful examination of the schedules in light of all of the undisputed evidence makes it plain that as to this item movant is correct. Commercial Credit's Exhibit B (plaintiff exhibit 15) shows that the $41,790.12, figure is arrived at by charging Howard with "80% of total assigned accounts receivable unpaid at July 12, 1954." It is not disputed that included in such accounts receivable were $9,144.46 of accounts assigned after September 25, and as to which Commercial Credit advanced no money, 80% of this figure was therefore reflected in the $41,790.12 balance shown to be due on July 12, 1954.

Wherever in the concluding paragraph of the opinion the figures $41,790.12 appear, they are stricken and in lieu thereof there are inserted the figures $34,474.55, so that the last paragraph of the opinion will read as follows:

> "We have analyzed the issues, including the figures, in light of the testimony and lengthy arguments

of counsel contained in the nearly 1500 pages of the record and more than 400 pages of briefs, reply briefs and answers and supplemental answers to reply briefs, and with the greatest difficulty have arrived at what we consider to be the grains of truth. They have been deeply hidden in much chaff. We conclude that such analysis, once made, shows that, without factual dispute, the principal sum of $34,474.55 was owed by Howard Corporation to Commercial Credit on July 12, 1954. We find no substantial issue drawn as to the debits or credits after that date except as to the computation of the service charge. The jury found the amount of attorneys' fees without reference to the amount of recovery. It is not contested. We hold, therefore, that on the record before us there was no substantial issue of fact as to appellant's right to recover the sum of $34,474.55, as principal amount due on July 12. $13,013.63 expenses covered by the contract, and $23,000 attorneys' fees. There must still be determined the amount due as service charge. In the light of the standard which we have set out above, we do not perceive that there can be any issue of fact as to the amount of this charge. In view of the complicated state of the record, however, we do not determine as a matter of law that there is no remaining issue for jury determination on this feature of the case, but leave this for the trial court to determine."

This ascertainment by us of the correctness of this contention by movant in no way reflects on the accuracy of the entries on the books of Commercial Credit Corporation, since the figures are dependent upon the legal effect to be given the entries rather than to the correctness of the figures themselves. We make this comment in light of movant's attack on the Court's holding that the books of account stand unimpeached in the consideration the Court was giving to the effect of the entries appearing in the books of account dealing with the charge-back of a check for $13,098.94.

As to all other matters the motion for rehearing is denied.

The matters raised by appellant in its brief in opposition to the motion for rehearing are not properly addressed to this Court. No money judgment is now being entered. The matter of certification to the District Court in Wisconsin of such judgment as is entered by the District Court in Texas and the computation of interest are both subjects for the initial consideration of the trial court.

APPENDIX C.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 17901

COMMERCIAL CREDIT CORPORATION,
Appellant and Cross-Appellee,

versus

WILLIAM J. SORGEL, Executor of the Estate of WILLIAM R. SORGEL, Deceased, and DOROTHY L. FOSTER,
Appellees and Cross-Appellants.

(AND REVERSE TITLE.)

Appeal and Cross-Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING.

(May 10, 1960.)

Before RIVES, Chief Judge, and HUTCHESON and TUTTLE, Circuit Judges.

PER CURIAM: Upon the filing by appellant of its "Motion for Leave to File Limited Petition for Rehearing" we have again given careful consideration to the book entries and mathematical calculations which produced the conclusion of this Court in its original order reversing the judgment of the Trial Court.

Following our consideration of the original motion for rehearing, filed by appellees, we modified our original judgment by striking the sum of $7,315.57 from the principal amount which we held Commercial Credit Corporation was entitled to recover. This modification was made because, as claimed by appellees, it was clear that the face amount of accounts receivable totalling $9,144.46, of which the smaller figure represented 80%, had been assigned from Howard to Commercial Credit after September 25, 1953, and were therefore not "purchased" by Commercial Credit.

In its present motion for limited rehearing appellant concedes that the sum of $9,144.46 was assigned after September 25, 1953, and no cash was advanced by Commercial Credit to Howard for either this amount or the 80% of it, $7,315.57. Appellant, however, points out that the total amount of $41,790.12, which in our original opinion we held to be the correct principal amount to which Commercial Credit was entitled, was arrived at, after appellees had been given full credit for the sum of $9,144.46.

Further reference to the ledger sheets in evidence demonstrates the correctness of appellant's position. It is clear that 20% of the $9,144.46 was included in a larger total of $15,342.59 and 80% was included in a larger total of $19,579.81, both of which figures were applied in the computation of the July 12, 1954, balance before arriving at the net figure of $41,790.12. That this is true is clearly indicated by the fact that the ledger sheets show that the daily credit balance of Howard on the books of Commercial Credit was increased during the period when these additional accounts were being assigned to Commercial Credit by the exact amount of the face of the accounts, totalling $9,144.46.

The correctness of this computation is further demonstrated by the fact, adverted to in our original opinion,

that the final figure of $41,790.12 principal was an agreed figure as between accountants for both parties except for the application of four separate items fully discussed in our original opinion. None of these four items was in any way concerned with this figure of $7,315.57.

It is apparent that the method of bookkeeping used by Commercial Credit Corporation, arising no doubt from its policy of treating every transfer of accounts receivable as a purchase for 80% of face value, whether or not any cash was advanced to Howard, has made unduly difficult the proper translation of the figures on ledger sheet in order to arrive at the correct balance between the parties. We are firm in the conviction however, that the reading and interpretation of these figures is within the province of the Court and not of the jury. We are convinced that the correct reading of them requires that we set aside our order entered on the motion for rehearing and reinstate the final order under which we concluded that the principal amount of indebtedness owed by Howard to Commercial Credit Corporation as of July 12, 1954, was $41,790.12.

The limited motion for rehearing is granted and the original judgment and order of this Court dated January 18, 1960, is hereby REINSTATED.

APPENDIX D.

JUDGMENT.

Extract from the Minutes of January 18, 1960.

No. 17901

COMMERCIAL CREDIT CORPORATION,

versus

WILLIAM J. SORGEL, Executor of the Estate of WILLIAM R. SORGEL, Deceased, and DOROTHY L. FOSTER,

(AND REVERSE TITLE.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees and cross-appellants, William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, and Dorothy L. Foster, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX E.

ORDER DENYING REHEARING.

Extract from the Minutes of April 11, 1960.

No. 17901

COMMERCIAL CREDIT CORPORATION,

versus

WILLIAM J. SORGEL, Executor of the Estate of WILLIAM R. SORGEL, Deceased, and DOROTHY L. FOSTER.

(AND REVERSE TITLE.)

IT IS ORDERED that the opinion and judgment heretofore filed on January 18, 1960, be corrected in accordance with the opinion this day rendered on petition for rehearing; and that as to all other matters said petition for rehearing be, and it is hereby, denied.

* * *

ORDER GRANTING REHEARING.

Extract from the Minutes of May 10, 1960.

No. 17901.

COMMERCIAL CREDIT CORPORATION,

versus

WILLIAM J. SORGEL, Executor of the Estate of WILLIAM R. SORGEL, Deceased, and DOROTHY L. FOSTER.

(AND REVERSE TITLE.)

IT IS ORDERED by the Court that the limited motion for rehearing filed in this cause be and the same is hereby granted, and the original judgment and opinion of this Court, dated January 18, 1960, is hereby reinstated.

* * * *

APPENDIX F.

COMMERCIAL CREDIT CORPORATION
CHICAGO, ILLINOIS

Howard Distributing Corporation, a Texas corporation, of San Antonio, herein called "Customer," and COMMERCIAL CREDIT CORPORATION, a Maryland corporation, of Chicago, Illinois, herein called "Commercial Credit," agree as follows:

First. Commercial Credit will, from time to time, purchase from Customer such Accounts (meaning Open Accounts Receivable, Book Debts, Notes, Acceptances, Drafts, Contracts and Choses in Action), as are acceptable to Commercial Credit, and will advance to Customer at the time of purchase Eighty Percent (80%) of the Gross face value of Accounts, and will pay the remaining Twenty Percent (20%) of the face value upon payment, in full, of such Accounts to Commercial Credit, less any deductions, and plus any over-payments by the debtors (meaning parties indebted on Accounts). No payments need be made by Commercial Credit in respect to any Accounts purchased or assigned hereunder if Customer be in default in the performance of any provisions of this Contract with respect to any Accounts whatsoever.

At the end of each month Commercial Credit will bill Customer for charges in connection with the purchase of Accounts during such month, and Customer will pay said charges forthwith. Said charges shall be computed upon the basis of the average daily outstanding face of Accounts during such month, the charges to be determined by applying against such average daily outstanding face of Ac-

counts the proper percentage shown below, depending upon the amount of the average daily outstanding face of Accounts during such month. Provided however Customer agrees that the minimum charge to be paid Commercial Credit in any one month in connection with accounts outstanding during such month shall be ($200.00) Two Hundred Dollars.

Average Daily Outstanding Face of Accounts During Month	Rate Per Day
—0— to $25,000.00	1/30%
$25,001.00 to $50,000.00	1 32%
$50,001.00 and over	1/34%

Second. Customer warrants, guarantees and agrees as follows: (a) Contemporaneously with the purchase of Accounts, which shall be subject to and governed by this Contract, Customer shall execute "Schedule of Accounts" or assignments so as to vest in Commercial Credit full title to Accounts, and thereupon Commercial Credit shall become and be entitled to all of the ownership, title, rights, securities or guaranties possessed by Customer in respect thereto, and in respect to the property evidenced thereby, including the right of stoppage in transit;

* * *

(c) Each Account will be paid in full on or before the date shown as its due date on the assignment thereof, and if not so paid, Customer shall upon demand promptly pay any amounts represented to be owing thereon to Commercial Credit;

* * *

(l) Commercial Credit may hold for purchase or as security any Accounts, property, securities or moneys of Customer, which may at any time be assigned to or de-

livered to or come into the possession of Commercial Credit, and may apply the same or the proceeds thereof to the payment of any amounts which at any time then or thereafter are or might be owing to Commercial Credit by Customer either under this contract or otherwise;

* * *

Sixth. * * * This Contract shall inure to and be binding upon the parties, their heirs, executors, administrators, successors and assigns, and shall be construed and governed by the laws of the State where it is accepted by Commercial Credit.

Seventh. * * * This Contract may be terminated by either party giving to the other party thirty (30) days notice in writing of its desire to terminate the Contract. This Contract shall not become effective until accepted by two officers of Commercial Credit.

IN WITNESS WHEREOF, Customer has caused this agreement to be executed April 17, 1953, San Antonio, Texas.

SIGNED Howard Distributing Corporation.

Accepted at Chicago, Illinois, by COMMERCIAL CREDIT CORPORATION, this 28th day of April, 1953.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~994~~ 134

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY I. FOSTER,
PETITIONERS,

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondent in Opposition

BERTHOLD MUECKE, JR.
J. FRANCIS IRETON
300 St. Paul Place
Baltimore, Maryland

CHARLES W. TRUEHEART
1910 National Bank of Commerce Bldg.
San Antonio 5, Texas

Attorneys for Respondent Commercial Credit Corporation

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	4
REASONS FOR DENYING THE WRIT	6
1. Practically Sole Issue the Sufficiency of the Evidence, Requiring Review of Six Volumes of Record	6
2. All Issues Given Meticulously Careful Consideration by Court of Appeals, and its Conclusions, Based in Part on Complicated problems of Accounting, Are Correct	7
3. No Federal Question Involved or Decided and Decision Herein Not in Conflict with Other Decisions	7
4. Court has Not herein so Departed from Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Supervision	8
5. No Questions are here Involved, the Settlement of which are of Importance to the Public	8
6. This Court should Leave Undisturbed the Interpretations of Local (Illinois) Law	8
ARGUMENT	9
CONCLUSIONS ON WHICH JUDGMENT WAS REVERSED ARE ENTIRELY CONSISTENT	9
1(a) No Holding of Fact Issue as to Amount of Accounts Purchased	9
1(b) No Conflicts in Holdings about Accounts taken as Security	11
1(c) Service Charges Based on Average Daily Balance of Accounts Actually Purchased	12

Page

2(a) No Conflict in Holding this at once a Loan Contract and one for Sale of Accounts 12

2(b) No Conflict in Holding as to Section Second (a) of the Contract 13

PETITIONERS NOT DEPRIVED OF RIGHTS GUARANTEED BY SEVENTH AMENDMENT 13

3. No Disagreement as between Respondent's Ledger Sheets and Accountants, including Petitioners' Montag.. in Reconcilement of $67,355.55 being Due Respondent on September 25, 1953 13

4. The $13 098 94 NSF Check was a Proper Debit Item, and Respondent did not Impeach its Own Ledger Sheets as to the Skillern Account 17

5. No Error in Debit Items on Service Charges or Expenses 19

6. There was No Impeachment of Respondent's Books 21

NO DEPARTURE OF COURT FROM ACCEPTED AND USUAL JUDICIAL PROCEEDINGS 22

7-8. There was No Evidence Showing Acceptance by Respondent of the Additional Accounts and Returned Merchandise in Payment 22

9. Petitioner Sorgel Liable in Spite of Dismissal of Other Two Guarantors 25

10. Petitioner Sorgel Liable in Spite of Informality of Howard Corp. Resolution 27

11-12. The Court had the Right to Direct Entry of Judgment for Respondent 28

SUMMARY 29

CONCLUSION 30

INDEX OF AUTHORITIES

Page

REPORTS

In re Baumgarth's Estate, 163 NE 2d 201 (Ill. App.) 13
Beebe vs. Kirkpatrick, 152 NE 539 (Ill. Sup.) 29
Blackford vs. Commercial Credit Corp., 263 Fed. 2d 97 (CA—5th, certiorari denied, 361 U.S. 825, 80 S. Ct. 74) 2
Brownell vs. Conquest, 2 SW 2d 995, 996 (Tex. App.) 27
Brunet vs. Cokins, 281 SW 2d 154, 156 (Tex. Civ. App. (R.N.R.E.) 16

Chesapeake & Ohio RR Co. vs. Martin, 283 U.S. 209, 213 24
Chicago Title & Trust Co. vs. Cohen, 1 NE 2d 717 (Ill. Sup.) 28
Clark vs. Mallory, 56 NE 1090 26

Dick vs. New York Life Insurance Co., 359 U.S. 437, 79 S. Ct. 921 7
Fort Worth & Denver RR Co. vs. Janski, 223 Fed. 2d 704 (CA—5th) 17

Gage vs. Mechanics' National Bank, 79 Ill. 62 26
Galloway vs. United States, 319 U.S. 372, 388-90, 63 S. Ct. 1077, 1086-90 5
George Scalfi & Co. vs. State, 73 SW 441 26

Hamer vs. Pennell, 96 Fed. 2d 227, 229 (CA—5th) 26
Hawkins vs. Maxfield, 318 SW 2d 492, 495 (Tex. CCA) 18
Heiger vs. Reynolds, 216 Fed. 2d 202 (CA—2nd) 24
Hillman vs. Hillman, 157 SW 2d 143, 145 (Tex. Civ.) 18
Holm vs. Jamieson, 70 NE 702 (Ill. Sup.) 28
Hyde vs. Claude Neon Federal Co., 137 SW 2d 952, 954 (Tex. CCA) 22

J. I. Case Co. vs. Linthicum, 77 SW 2d 578 (Tex. CCA) 29
Joe Heaston Tractor & Implement Co. vs. Securities Acceptance Corp., 243 Fed. 2d 196 (CA—10th) 29

King vs. Bruce, 291 SW 2d 691, 699 (Tex. Sup.) 27

Page

Layne & Bowler Corp. vs. Western Well Works,
261 U.S. 387, 43 S. Ct. 422 8
Liberty Mutual Insurance Co. vs. Thompson,
171 Fed. 2d 723 (CA—5th) 17
Lipe vs. Webster, 278 SW 246 (Tex. CCA) 26
Long Beach Brick Co. vs. De Dodson, 285 Pac. 382
(D. C. App.—Calif., rehearing denied by Supreme
Court) 18

Magnum Import Co. vs. Coty,
262 U.S. 159, 43 S. Ct. 531 8
Massey vs. Farmers' National Bank, 104 Ill. 327, 331 26
Masterson vs. Bouldin, 151 SW 2d 301,
308 (Tex. CCA) (E.R.) 18
Motor & Industrial Accident Board vs. Hughes,
302 SW 2d 386, 391 (Tex. Sup.) 28
Munoz vs. Brassel, 104 SW 417, 418-9 (Tex. CCA) 26

National Surety Co. vs. United Brick & Tile Co.,
71 SW 2d 937, 940 (Tex. CCA) 26

Parmelee vs. Lawrence, 44 Ill. 405 26
Pennsylvania RR Co. vs. Chamberlain,
288 U.S. 333, 53 S. Ct. 391, 393 29

Reighley vs. Continental Bank & Trust Co.,
61 NE 2d 29 (Ill. Sup.) 27
Reitan vs. Travellers Indemnity Co.,
267 Fed. 2d 66, 68 (CA—7th) 30
Revlon, Inc. vs. Buchanan, 271 Fed. 2d 795 (CA—5th) 29
Roumsaville vs. Bullard, 155 Tex. 260, 276 SW 2d 791, 794 30
Rice vs. Sioux City Memorial Park Cemetery, Inc.,
349 U.S. 70, 74, 75 S. Ct. 614, 616 8
Rice vs. Webster, 18 Ill. 331 25, 26

Sentilles vs. Inter-Caribbean Shipping Corp.,
361 U.S. 107, 80 S. Ct. 173, 177 6, 29
Snell Isle, Inc. vs. Commissioner, 90 Fed. 2d 481,
482 (CCA—5th) 19

Page

Southern Power Co. vs. North Carolina Public Service Co., 353 U.S. 506, 44 S. Ct. 164 7
Spiegel's Estate vs. Commission of Internal Revenue, 335 U.S. 701, 703, 69 S. Ct. 301, 304 6
Spitz vs. Morse, 72 Atl. 174 (Maine) 24

Taylor vs. Leonard, 275 SW 134, 135 (Tex. Civ. App.) 27
Tinkham vs. Wright, 163 SW 615, 619 (Tex. CCA) 26

Union Trust Co. vs. Grossman, 245 U.S. 412, 62 L. Ed. 368, 38 S. Ct. 147 27
United States vs. Carver, 260 U.S. 482, 43 S.Ct. 181 (Sup.) 2
United States vs. Isthmian Steamship Co., 359 U.S. 314, 316-19, 79 S. Ct. 357, 360 24
United States vs. Wainer, 211 Fed. 2d 660 (CA—7th) 25, 26

Weger vs. Robinson Nash Motor Co., 197 NE 7, 11 (Ill. Sup.) 24
Williams vs. National Surety Corp., 257 Fed. 2d 770, 776-7 (CA—5th) 20
Winkle vs. Scott, 99 Fed. 2d 299 (CCA—6th) 2

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution — Seventh Amendment 4, 13
28 U.S.C.A., Section 1732 20
45 U.S.C.A., Section 51 et seq. (Federal Employers' Liability Act) 7
46 U.S.C.A., Section 688 (Jones Act) 7, 20
Article 4623, Vernon's Annotated Texas Statutes 27
Smith & Hurd's Illinois Statutes, Chap. 74, Sections 4-6; Chap. 32, Section 6 2

TEXTS

20 Am. Jur. 771 18
19 C.J.S. 472 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 994

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,
PETITIONERS,

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondent in Opposition

STATEMENT OF THE CASE

Jurisdiction is based upon diversity of citizenship.

In support of its claim and against the defenses of Petitioner Sorgel, as well as the maintenance of the counterclaim, Respondent duly presented a Motion for Directed Verdict and a Motion for Judgment Notwithstanding the Verdict. In overruling these motions and rendering judgment on the minority stockholders' counterclaim, the trial court awarded the whole of this recovery of $24,318.14 to Petitioners personally for their expenses in obtaining such judgment for the benefit of the corporation (R. I, 97-8).

The case in the main is sufficiently stated in the several opinions of the Court of Appeals, 274 Fed. 2d 449-67, 277 Fed. 2d (Petition 1a-42a), as well as in the "history" given in the Petition (5-8) with one exception. That exception is: the Court of Appeals did not remand this cause "for the sole purpose of determining the amount of outstanding accounts receivable that were unpaid so that interest thereon could be computed." Aside from "further proceedings not inconsistent with this opinion", it remanded for the determination of "the amount due as service charges" (Petition 35a, 42a) which "should be figured on the average daily balance of accounts actually 'purchased', or on which Commercial Credit had actually advanced 80% of the face value" (Petition 33a).

The contract guaranteed, by which Commercial Credit agreed to "purchase from Customer" (Howard Corp.) accounts receivable and to "advance to Customer" 80% of the gross face value of such accounts (R. I, 136-7), is identical in terms with the one involved in **Blackford vs. Commercial Credit Corporation**, 263 Fed. 2d 97 (CA—5th, certiorari denied, 361 U.S. 825, 80 S. Ct. 74). Just as in that case, so in this, under the law of the state where finally accepted (Maryland in that, Illinois in this) there is no restriction on the rate of interest that may be agreed upon by a borrowing corporation, nor the guaranty by an individual of a loan to a corporation.*

The written guaranty sued upon (R. I, 138) is sufficiently stated in the Court's opinion (Petition 2a).

The one "substantial issue" on which the case went to trial, as well as the manner in which Respondent "made

*Smith-Hurd's Illinois Statutes, Chapter 74, Sections 4-8, and Chapter 32, Section 6. **Winkle vs. Scott**, 99 Fed. 2d 299 (CCA—8th).

out its prima facie case by introducing its original ledger sheets" (R. III, 649-63), is correctly stated in the opinion (Petition 6a-7a). The same thing is true about the outline of the "three basic efforts to attack the correctness" of Respondent's figures, to-wit: (1) "correctness of basic figures" (Petition 7a-13a), (2) "assignment of accounts for 'credit'" (Petition 13a-20a), and (3) "credit for returned merchandise" (Petition 21a-25a).

The three opinions of the Court of Appeals very much more fairly state the "facts" than does the Petition under that caption (8-11), and the latter requires corrections in several particulars, as presently shown.

First of all, to explain Petitioners' references (9-10) to Respondent's receipt after August 26, 1953, of additional accounts and returned merchandise, the undisputed testimony is that the $46,723.40 in invoiced value of Howard Corp. accounts receivable taken by Commercial Credit after August 26, 1953, were taken only as further security and not in payment (R. II, 410, 338-9, 342). The same thing is true about the $68,445.56 invoiced value of merchandise (R. II, 267, 337, 339, 410, 411, 447; R. III, 527, 630-1, 635; R. IV, 879, 882, 883).

This incredible plea of payment is the principal basis of Petitioner Sorrell's defense and Petitioners' counterclaim and is later discussed (post 22).

By the bottom paragraph on page 10 of the Petition, it is sought to show that Respondent is responsible for the disappearance of $25,794.44 of Howard Corp. merchandise placed in its custody as security. This idea was invented by Petitioners after the original reversal of the case by the Court of Appeals, and is discussed later (post 28).

Petitioners (11) conclude their review of these so-called "facts" with the statement that the basic sum of $41,790.12 consisted principally of the Skillern & Son account of $32,500.52, and the Ward Drug Co. account of $1,409.18, the remainder being the balance on accounts receivable obtained by Commercial Credit after August 26, 1953. None of these statements is borne out by the references to the record given by Petitioners.

We shall have occasion to discuss the Skillern and Ward accounts later (post 17), but the statement that any part of the $46,723.40 of accounts taken after August 26, 1953, as security is included in the basic or principal sum of $41,790.12 found due by the Court (Petition 35a) is absolutely untrue. This is apparent from an examination of Plaintiff's Exhibit 15 (Petition 31, Note 15; R. III, 675-6) which shows that the $41,790.12 is arrived at by taking the "total assigned accounts receivable unpaid at July 12, 1954" of $76,712.52 (which would include the unpaid balance of the accounts taken as security), and deducting from it first the "contingent reserve of 20% of the unpaid accounts", or $15,342.50, and then deducting from that result the "reserve adjustment — net credit resulting from schedules of assignments credited collection reports, debits and credits, unpaid checks, checks on accounts and miscellaneous adjustment" of $19,579.31. Thus, since these security accounts were entered in the credit side of the reserve adjustment account that was deducted, the final result of $41,790.12 could not include them (post 11).

QUESTIONS PRESENTED (Petition 2-4)

1. The principal question presented arises on the assertion of Petitioners that the decision of the Court of Appeals deprives them of the right of jury trial in violation of the

Seventh Amendment of the Constitution of the United States, by reason of its holding that Respondent was entitled to a directed verdict, except as to the amount of service charges and attorneys' fees. The basis for this holding is that there was not in the record, with the exception of the service charges, any substantial issue of fact as to Respondent's right to recover the cash advanced and expenses incurred as shown by Respondent's original ledger sheets, or its right to recover the uncontested amount of attorneys' fees due under the contract as found by the jury, and that, as to Petitioner Sorgel's defenses, there was either no substantial evidence to warrant the submission to the jury of issues with relation thereto, or else the findings of the jury thereon were legally immaterial. In other words, the decision of the Court of Appeals is **not based upon fact conclusions** of any kind but upon numerous well-supported conclusions of law. If this case raises a question under the Seventh Amendment, so does every case involving the direction of a verdict or a judgment notwithstanding the verdict **Galloway vs. United States**, 319 U.S. 372, 388-90, 63 S. Ct. 1077, 1086-90. (See post 13).

2. The answer to whether the Court of Appeals could reverse a judgment based upon a jury verdict and judgment for Petitioners and direct entry of a money judgment for Respondent by (a) resolving evidentiary conflicts against Petitioners, and (b) rejecting evidence presenting a jury question, lies in the fact that **the Court of Appeals did nothing of the kind**, as more fully shown later (post 13).

3. The Court of Appeals herein has not in any way departed from the accepted and usual judicial proceedings by (a) viewing the evidence against rather than in favor of Petitioners, (b) making fact findings of any kind, particularly none contrary to the evidence, (c) substituting its

for damages for those made by the jury, or (d) substituting its interpretation of technical accounting records and procedures for the testimony of record custodians and expert witnesses. (See post 18).

4. Neither the District Court nor the Court of Appeals erred in holding Petitioner Sorgel liable upon his guaranty of the corporation's contract where (a) all three guarantors were sued, but prior to trial two of them were dismissed with prejudice over the objection of the remaining guarantor, Sorgel, (b) the authority of the officers acting for the corporation rested upon the corporate resolution of the Board of Directors of Howard Corp. (R. I.170) (See post 25, 27)

5. The Court of Appeals could properly, after a jury verdict and judgment for Petitioners, both in the main action and on the counterclaim, reverse the judgment and direct entry of a money judgment for Respondent because there is no substantial evidentiary basis for the jury's verdict and the judgment entered thereon. (See post 28).

REASONS FOR DENYING THE WRIT

1.

PRACTICALLY THE SOLE ISSUE IN THIS CASE IS THE SUFFICIENCY OF THE EVIDENCE, AND A GRANTING OF THE WRIT WILL REQUIRE THAT THIS COURT REVIEW THE SIX VOLUMES OF THE RECORD IN ORDER TO EVALUATE SUCH EVIDENCE.

As shown by Mr. Justice Frankfurter's dissenting opinion in **Sentilles vs. Inter-Caribbean Shipping Corp.**, 361 U. S. 107, 80 S. Ct. 173, 177, "the practice of not taking cases turning solely on the evaluation of evidence has been con-

sistently adhered to, barring an occasional sport like **Dick vs. New York Life Insurance Co.**, 359 U.S. 437, 79 S. Ct. 921, except in the special class of cases arising under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51 et seq. and its twin, the Jones Act, 46 U.S.C.A., Section 688." See also **Southern Power Co. vs. North Carolina Public Service Co.**, 363 U.S. 308, 44 S. Ct. 164.

2.

THE ISSUES BEFORE THIS COURT, AS PRESENTED BY THIS LARGE RECORD, WERE GIVEN A MOST METICULOUSLY CAREFUL AND PAINS-TAKING DETAILED CONSIDERATION BY THE COURT OF APPEALS, AND ITS CONCLUSIONS, BASED PARTLY UPON COMPLICATED PROBLEMS OF ACCOUNTING, ARE IN ALL RESPECTS CORRECT, 274 Fed. 2d 449, 277 Fed. 2d . (Petition 1a-42a).

The nearly 1500 pages of the record and more than 400 pages of briefs have now been increased by the additional proceedings in the Court of Appeals. The Court of Appeals says that they —

> "with the greatest difficulty have arrived at what we consider to be the grains of truth. They have been deeply hidden in much chaff." (Petition 35a).

3.

THERE IS NO FEDERAL QUESTION INVOLVED OR DECIDED IN THIS CASE, AND THE COURT OF APPEALS HAS NOT RENDERED A DECISION THEREIN IN CONFLICT WITH THIS COURT OR WITH ANOTHER COURT OF APPEALS.

The conflicts claimed (Petition 19-20, 28-9, 39, 42, 48-9, 50-1, 54-5, 59-60) do not exist, the cases cited not being in point (post 17, 24, 29).

4.

THE COURT OF APPEALS HAS NOT HEREIN SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This Court in **U. S. vs. Carver**, 260 U.S. 482, 43 S. Ct. 181, said that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case."

5.

THERE ARE NO QUESTIONS INVOLVED IN THIS CASE, THE SETTLEMENT OF WHICH ARE OF IMPORTANCE TO THE PUBLIC, AS DISTINGUISHED FROM THAT OF THE PARTIES.

Layne & Bowler Corp. vs. Western Well Works, 261 U.S. 387, 43 S. Ct. 422; **Magnum Import Co. vs. Coty**, 262 U.S. 159, 43 S. Ct. 531; **Rice vs. Sioux City Memorial Park Cemetery, Inc.**, 349 U.S. 70, 74, 75, S. Ct. 614, 616.

With great ingenuity and industry, intense partisanship, much self-assurance and affrontery, and very little regard for exactness in the truth, Petitioners denounce in unmeasured terms the closely analytical and absolutely fair and, we believe, correct opinions of the Court of Appeals. They assume, without making any pretense of showing it, that this case is one of importance to this Court, and of equal importance to the public at large simply because it is one of importance to them.

6.

THIS COURT SHOULD LEAVE UNDISTURBED THE INTERPRETATIONS OF LOCAL (ILLINOIS) LAW.

Spiegel's Estate vs. Commission of Internal Revenue, 355 U.S. 701, 708, 69 S. Ct. 301, 304.

The Federal Court's jurisdiction herein is based upon diversity of citizenship and by the terms of the contract involved it is to be construed by the laws of Illinois where it was executed, and most of the questions involved are determinable under the laws of that state, notably the questions of alleged fraud (Petition 5a; post 12-3), the question of payment after cancellation of the contract through taking of additional accounts and returned merchandise (Petition 16a; post 22), and the questions of Sorgel's liability in spite of the dismissal of the other two joint and several guarantors (Petition 33d-34a; post 25), and in spite of the informality of the Howard Corp. resolution authorizing the contract (post 27).

The Illinois decisions cited in these several portions of the opinion below, as well as in our later argument, very clearly decide and control the questions of law at issue on these matters in this case.

ARGUMENT

CONCLUSIONS ON WHICH JUDGMENT WAS REVERSED ARE ENTIRELY CONSISTENT (Petition 11):

1 (a) The Court of Appeals does not hold that there was a fact issue as to the amount of accounts receivable Commercial Credit had actually "purchased" prior to the termination of the contract on September 25, 1953, and did not remand the case for the purpose of having the amount of those accounts determined. Upon the contrary, in its final conclusions, in the original opinion, the Court of Appeals very plainly says:

> "We conclude that such analysis, once made, shows that, without factual dispute, the principal sum of $41,790.12 was owed by Howard Corp. to Commer-

> cial Credit on July 12, 1954. We find no substantial issue drawn as to the debits or credits after that date except as to the computation of the service charges . . . We hold, therefore, that on the record before us there was no substantial issue of fact as to Appellant's right to recover the sum of $41,790.12, as principal amount due on July 12, etc." (Petition 35a).

It then remands the case for the determination of "the amount due as service charge".

This conclusion, although changed on Petitioners' Petition for Rehearing (Petition 37a-38a), was reinstated completely on Respondent's Petition for Rehearing (Petition 40a-42a).

Now the Court had already held that the service charges "should be figured on the average daily balance of accounts actually 'purchased', or on which Commercial Credit had actually advanced 80% of the face value", in accordance with the terms of the contract (Petition 32a-33a).

The only thing that this "average daily balance, etc." has to do with this principal sum of $41,790.12 is that, beginning on July 12, 1954, this sum is the "average daily balance", but before September 25, 1953, when the contract terminated, this "average daily balance", as shown by Commercial Credit ledger sheets (R. III, 649-63) might vary from day to day. That is doubtless the reason why the Court said that "we do not perceive that there can be an issue of fact as to the amount of this [service] charge", but, "in view of the complicated state of the record", nevertheless remanded for the determination of the service charge (Petition 35a).

Being wrong in their premise, Petitioners are wrong in their conclusion of a contradiction in the Court's opinion.

1 (b) In their attempt to stultify the Court of Appeals,

Petitioners (13) assert that though the Court had held that the $46,723.40 of accounts receivable accepted by Commercial Credit after August 26, 1953, were taken as security and not as payment (Petition 13a-20a), the Court's finding on Respondent's Petition for Rehearing (Petition 40a-42a) that the $9144.46 of these accounts taken by Commercial Credit after September 25, 1953, were included in the 20% and 30% credits on July 12, 1954, of $15,342.59 and $19,479.81, "unmistakably conflicts" with its first mentioned basic conclusion.

What the Court is talking about on rehearing relates to Plaintiff's Exhibit 15 (R. III, 675-6; Note 15, Petition 31), but what Petitioners fail to take into account is the fact that the balance unpaid of $46,723.40 on July 12, 1954, is included in the $76,712.52 (total assigned accounts receivable unpaid) as shown by that Exhibit, so that when you have deducted 20% of these accounts then unpaid and also deducted the reserve adjustment net credit thereon of 30%, you have by no means accepted this amount of these accounts as payment, for the credit offsets the debit, so far as this much of the account is concerned.

The claim of Petitioners that $7315.56 (80% of $9144.46, which is the part of the $46,723.40 that was assigned to Commercial Credit after September 25, 1953) was included in the $41,790.12 was the subject matter of the two per curiam opinions of the Court of Appeals on rehearings (Petition 36a-42a), and it was definitely held in the last of these opinions that such sum was not so included, either according to Plaintiff's Exhibit 15 or according to Commercial Credit's ledger sheets. This is supported by the direct testimony of Kratz (R. V, 1003), an examination of said Exhibit, Rossiter's explanation of it (it being sometimes referred to

as Exhibit B) (R. III. 669), the absence of any claim on the part of Petitioners' accountant witness, Montag, and, most conclusive of all; the fact that the daily credit balance of Howard on the books of Commercial Credit (R. III. 655-7) was increased during the period when these additional accounts were being assigned by the exact amount of the face of such accounts, $9144.46. (Petition 41a, bottom).

There is nothing wrong about the $15,342.59 and the $19,579.81 not equalling the total of $46,723.40 of accounts assigned after August 26, 1953, for the $15,342.59 is shown on this Exhibit 15 to be 20% of "unpaid accounts" as of July 12, 1954. Evidently some of these accounts had been paid in the interval of about a year.

Again, there is no reason why a deduction of the $46,723.40 of security accounts from the $76,712.52, total of assigned accounts receivable unpaid at July 12, 1954, as shown in this Exhibit 15, should equal $41,790.12, because though the latter amount is the unpaid balance of accounts assigned before August 26, 1953, and so included in the $76,712.52, the $46,723.40 is not the **unpaid** balance of accounts assigned thereafter, but the full amount of such accounts so assigned.

1 (c) The Court of Appeals made it perfectly plain that the service charges should not be based upon the accounts received as security, but only on the average daily balance of the accounts actually purchased or on which Commercial Credit had actually advanced 80% of the face value (Petition 33a).

2 (a) As already explained, there is no conflict in the idea that the contract was at once a loan contract and one for sale of accounts receivable (ante 9). The latter function is in effect a security for the purposes of

the former. It should be noted, however, that this was only one of a number of grounds on which the Court set aside the jury's findings on fraudulent misrepresentation (Petition 4a-6a). See, in addition to authority cited Petition 5a, **In re Baumgarth's Estate**, 163 NE 2d 201 (Ill. App.).

2 (b) The same thing is true about the similar holding of the Court with reference to Section Second (a) of the contract transferring full title to all accounts to Commercial Credit, though this again is only one of a number of grounds on which the Court held that neither the accounts nor the returned merchandise were taken in payment and not as security (Petition 13a-25a).

The findings of the Court that this was a loan contract for some purposes and a sales contract for other purposes were by no means irreconciable.

THE COURT OF APPEALS DID NOT DEPRIVE PETITIONERS OF RIGHTS GUARANTEED BY THE SEVENTH AMENDMENT

(3) If the object of Petitioners (16) is to obscure the ultimate facts about the agreement of all accountants for both parties on the figure of $67,355.55 as the amount owed Commercial Credit on the termination of the contract on September 25, 1953, it could not have been better accomplished than to take this Court through the maze of evidential figures shown on page 17 of the Petition.

To clarify the matter: It is true that one basis of the decision of the Court of Appeals on the principal amount of $41,790.12 being due Respondent on July 12, 1954, is the qualified agreement of Petitioners' accountant witness, Montag, to the fact that $67,355.55 was due Commercial Credit on September 25, 1953 (Petition 8a-9a, 20a, 35a), the

other basis being Respondent's ledger sheets, which are the only original documentary evidence about the matter.

On cross examination of Montag (Note 11, Petition 20a-21a), the following appears:

"Q. In other words, Mr. Montag, there is no difference between you and Mr. Rossiter's figures. The only difference is in the way you treated them.

"A. Application, yes, sir.

"Q. The application of figures. In other words, there is no disagreement as to the basic books, but merely as to the method of applying.

"A. That is correct." (R. V, 1165)

In the light of this, it would seem amazing if the ledger sheets, their custodian, Kratz, and the accountants Rossiter and Montag were in the state of complete disagreement indicated now by Petitioners (17).

There is no such disagreement among them on the ultimate facts.

The Commercial Credit's ledger sheets (Plaintiff's Exhibit 14, R. III, 649-63), sometimes called its loan control card (R. III, 647), for the Howard Corp. account, as kept under the direction of Mr. Kratz, show, as also concretely testified to by Mr. Kratz, that the amount due Appellant as of September 25, 1953, was $67,355.55 (R. V, 1031).

This figure is borne out by the testimony of Lewis E. Rossiter, an independent certified public accountant from Chicago, and he consolidated his findings, from an examination of Appellant's records, into Plaintiff's Exhibit 15 (R. III, 675-6). His figure of $68,128.53 as due Appellant on September 25, 1953, includes the September service charges

of $772.98, thus accounting for the difference as against $67,355.55 (R. III, 701).

Mr. Montag, the accountant witness for Petitioners, had the use of all the books and records of Howard Corp., as well as Respondent's ledger sheets (R. V. 1194-10), and he reconciled figures with Appellant only as of September 25, 1953, when the contract terminated, and he agreed with the figure of $67,355.55 as due Commercial Credit at that time, except only as it might be altered by several credits to Howard Corp., which are claimed by Mr. Montag and denied in application by the Court (Petition 8a-20a; R. V. 1163-5).

The unpaid portion of 80% of the $46,723.40 ($37,378.71) of accounts taken by Commercial Credit as security after August 26, 1953, is not included in the $41,790.12 principal sum due Respondent (as claimed by Petitioners 17-18), although Mr. Montag undertook to charge this sum as a debit against Commercial Credit, his theory in doing so being fully discussed by the Court of Appeals with a full statement of the facts (Petition 15a-19a), to which we add these record references: R. V. 1171, 1155, 1156, 1193, 1197.

Thus is dispelled, we believe, the fiction that Petitioners were deprived of their constitutional right to jury trial by reason of the Court of Appeals having carefully analyzed the issues, as presented in this large and confusing record, and excluded the reasonable possibility of there being any ultimate issues of fact for a jury.

Petitioners (18-19) attempt to point up reasons against the acceptance of Montag's definite admission on cross examination of his reconcilement with the figure of $67,355.55 as of September 25, 1953, as follows:

First: There is no discrepancy between the pleadings of the ultimate amount due (R. I. 15), the Court's statement

of this (Petition 1a), and the holding of the Court about how the $67,355.55 is arrived at (Petition 20a).

Second: It is not true that there is no factual basis for the above noted cross examination of Montag in that Rossiter testified to the figure of $68,128.53 (R. III, 668-9) rather than $67,355.55, for Rossiter in the same connection makes it plain that the difference is accounted for by his inclusion of the September service charges of $772.98 (R. III, 701).

Third: It is said that "the figures used by Montag in the reconcilement were for the purpose of such hypothesis only" (Petition 19), but we assume that the truth is the same for all purposes.

Fourth: Although Montag explained that he did not agree with the debit of the $13,098.94 NSF check against Howard Corp. and Petitioners (20) accuse the Court of Appeals of "unfairly slanted findings" about the matter, we would think that only the most biased and partisan sort of mind could disagree with the Court about this matter.

The Court discusses this item at some length (Petition 9a-13a). The question is whether the chargeback was warranted by a previous credit, the previous credit having been in a larger sum that included the $13,098.94 check, and the Court accepts this showing on Commercial Credit's ledger sheets upon the basis that these entries are presumed to be correct in the absence of any impeachment or contradiction, and that the testimony of Bob Howard might have been available to Petitioners to contradict if this original credit item had been incorrect (Petition 12a). More than this, the books and records of Howard Corporation, which Montag says he had in his possession at the time of trial (R. V, 1104-5), should have been available to contradict if there had been any error. We therefore suggest that it

is utterly unfair for Petitioners (25) to charge that the Court of Appeals "re-weighed the testimony and substituted its interpretation".

In order to avoid the effect of their own accountant's testimony, Petitioners (20) cite **Liberty Mutual Insurance Co. vs. Thompson**, 171 Fed 2d 723 (CA—5th), and **Fort Worth & Denver Ry. Co. vs. Janski**, 223 Fed. 2d 704 (CA—5th), to the effect that his testimony need not be credited in its entirety and that as the opinion of an expert it was not binding upon Petitioners. The cases cited relate to medical diagnosis and prognosis, something considerably less exact than accountancy.

4. As previously shown by us (ante 16), the $13,093.94 NSF check was a proper debit item and the record references given by Petitioners (11, 25) to the statement that Rossiter included 80% or $32,500.53 of the Skillern account and $1,409.13 of the Ward Drug Account in the principal sum of $41,790.12, do not support the statement. When we look to Plaintiff's Exhibit 22 (R. V, 1041-9) and the identical Defendants' Exhibit 13 (R. III, 615-9) and Defendants' Exhibit 13 B (R. V, 1251-62), especially looking at the latter, which is alphabetically arranged, we find that the invoices to Skillern covering the largest amounts were made after August 26, 1953. Thus, an item of August 27 of $1550.40 marked "Ret Mdse.", an item of September 1 of $10,828.80, and an item of September 2 of $4492.80, as well as many smaller items, appear to have fallen in the security category, being accounts taken by Commercial Credit after August 26, 1953, and therefore could not have been included in the balance of $41,790.12 of acounts assigned prior to the cancellation of the contract on August 26, 1953.

As shown above, it appears that, after Petitioners had introduced in evidence the Howard Corp. account against

Skillern, Commercial Credit placed in evidence an identical account with Skillern, showing the same amount of $884.60 due.

Thus, it is claimed that Respondent's Exhibit 22 was a judicial admission impeaching its ledger sheets. It is shown, however, in the testimony of Kratz, appearing in Note 13, page 27 of the Petition, that the statement of the Skillern account furnished by Howard Corp. and sent to Skillern demanding only $884.60 about February 15, 1954, was used rather than what their books showed because they did not know the condition of the Skillern account, and in this connection it is noted that between August 25, 1953, and February 11, 1954, more than $28,000 is shown to have been credited to this account (R. III, 619).

Under these circumstances, the holding of the Commission of Appeals of Texas in **Hillman vs. Hillman,** 157 SW 2d 143, 145, an opinion adopted by our Supreme Court, would seem to be applicable. In that case, complaint was made that the plaintiff was allowed to offer an auditor's report in evidence, and then to offer testimony contradictory of certain items in it, and the Court in overruling this contention quoted R.C.L., now 20 Am. Jur. 771, as follows:

> "'And in analogy to the rule that while a party may not impeach his witness generally, he may prove the truth of particular facts in direct contradiction of the testimony of such witness, the authorities hold that a party introducing documentary evidence may disprove facts stated therein.'".

See also **Masterson vs. Bouldin,** 151 SW 2d 301, 303 (Tex. CCA) (E.R.); **Brumit vs. Cokins,** 281 SW 2d 154, 156 (Tex CCA) (R.N.R.E.); **Hawkins vs. Maxfield,** 318 SW 2d 492, 495 (Tex. CCA); **Long Beach Brick Co. vs. De Dodson,** 285 Pac. 382 (D.C. App.—Calif., rehearing denied by Supreme Court).

Here, too, as in **Snell Isle, Inc. vs. Commissioner** 90 Fed. 2d 461, 482 (CCA—5th), "it was unnecessary to limit the purpose for which they [the documents] were introduced by any statement of counsel."

Petitioners (30) complain that Respondent did not sue on some accounts within the limitation period, but Kratz explains that "if the account [debtor] had paid money to Howard and we didn't get it, [or] if he had returned merchandise to Howard, we couldn't collect those accounts" (R. V. 1006).

5. Petitioners (30-2) assert error in the computation of interest on "the **$19,579.81 it had collected** and credited on July 12, 1954", referring in this connection to Plaintiff's Exhibit 15, which is set out in their appended Note 15.

As shown in Plaintiff's Exhibit 15, this $19,579.81 was not simply a collection item, and the question put to the witnesses was the matter of interest or service charges being based upon the entire $76,712.52 shown in said Exhibit to be the "total assigned accounts receivable unpaid." The Court of Appeals (Petition 32a-33a) held that though the service charges were to be computed on the average daily balance of accounts actually purchased, they were erroneously not so computed by Respondent, and the matter of determination of the service charges on the basis of this standard was left to the trial court on the remand of the case (Petition 35a). In other words, the Court of Appeals held that the service charges could not be computed upon the basis of the accounts not purchased but taken as security. How the frank admissions of their erroneous interpretation of the contract by Respondent's officers should go to the credibility of the witnesses we are at a loss to understand.

The second debit item of which Petitioners (32-3) complain relates to expenses amounting to $170.25, for which

Respondent had no proof except the showing of its ledger sheets, and other expenses in the sum of $2263.61, for which no proof was made as to the necessity therefor and reasonableness thereof.

We do not find that the Court of Appeals recognized any failure of proof with reference to any of these expenses. The statement made by Petitioners (33) that "it was stipulated that **only** $10,730.02 of the expenses were necessary and reasonable" is misleading, to say the least. Actually, all of the expenses incurred up to the date of the agreement, April 9, 1956, by both parties were stipulated to have been reasonable and necessary and to have been expended in the prosecution of this suit, and in the case of Respondent they are shown to have amounted to $10,730.02 (R. IV, 767-70).

All of the expenses were on the ledger sheets up to October 23, 1956, when the ledger sheets terminated (R. III, 661-3, 765-6). Most of these expenses, including the greater part of the $1867.69 expenses incurred after the termination of the ledger sheets, were substantiated by vouchers (R. IV, 772-7). None of the expenses were in any wise questioned by Petitioners, who offered no evidence with respect thereto. Thus they all stand completely undisputed in nature and amount.

In this connection, in **Williams vs. National Surety Corp.**, 257 Fed. 2d 770, 776-7 (CA—5th), it was said with reference to permanent records of payrolls, vouchers, invoices and data supporting expenditures in a very large sum on a construction job, and therefore admissible under 28 U.S.C.A., Section 1732 (Petition 11a-12a):

> "Actually, the objection of W. & B. comes down to the assertion that . . . this was not sufficient evidence to establish that the items which the exhibits disclosed were expended were reasonably, necessarily

and actually spent by Ball because of W & B's default. As such, that is but another facet of the basic complaint on the sufficiency of the evidence which we have already held met the legal test."

We have already fully discussed the third debit-item complained of by Petitioners (33) and their claim that 80% ($7315.77) of the $9144.46 of accounts receivable taken by Commercial Credit as security after September 25, 1953, was included in the $41,790.12 principal sum due on July 12, 1954. (ante 11). And, in this connection, it does not appear that the court ignored the interpretation put upon the Commercial Credit records by Mr. Rossiter or by Mr. Kratz.

Defendants' Exhibit B (R. V. 1251-62) indicates that this $9144.46 was included in the $76,712.52 "total assigned accounts unpaid at July 12, 1954", but Plaintiff's Exhibit 15 (Note 15, Petition 31) shows that this 80% of such accounts, as well as the 20% thereof, were eliminated before the remainder of $41,790.12 was reached.

6 (a). What has just been said is applicable again to the contentions made by Petitioners before in this connection (36-8). "Book entries are either correct or incorrect", and these are taken by the Court as correct because there is not the least reasonable intimation in the evidence of their being incorrect.

6 (b). In fairness to Mr. Kratz, his explanation about not remembering in the former trial the figure of $41,790.12 mentioned in the complaint is that the figure was the result of several deductions, it being included in the over-all figure of $76,712.52 of which he was mindful (R. V. 1013-14).

6 (c). (Petition 40-42) Neither Rogers nor Kratz admitted that the latter swore falsely to defendants' request for admissions. Actually what Rogers said was that they got a little confused on these things and that he knew they sent a notice to the guarantors in October (R. III, 454-5). This was not an unnatural confusion, since no demand for repurchase by the guarantors was required under the guaranty (R. I, 138). These things illustrate Petitioners' method of probing into collateral and immaterial matters.

Book entries, though far more reliable than memory or opinions, are not, of course, conclusive, when there is contradictory or impeaching evidence, but there was none such here. As said in the opinion of the Court of Appeals, "the appellant made out its prima facie case by introducing its original ledger sheets" (Petition 7a). In **Hyde vs. Claude Neon Federal Co.**, 157 SW 2d 952, 954 (Tex. CCA), it is said with respect to a ledger sheet "that it constituted prima facie evidence of performance by the plaintiff and, there being no evidence to the contrary, was sufficient."

THERE IS NO DEPARTURE OF THE COURT OF APPEALS FROM THE ACCEPTED AND USUAL JUDICIAL PROCEEDINGS.

7 and 8. Petitioners (42-9), by their counterclaim, sought to recover **for themselves** (the judgment of the trial court so awarded it, R. I, 98) the value of returned merchandise and accounts taken by Respondent as security after August 26, 1953, on the theory that there was testimony to support the jury's findings that these accounts and returned merchandise were accepted by Commercial Credit in payment, and the further theory that Commercial Credit exercised its election under Section Second (1) of the contract to accept and apply such merchandise and accounts

as payment (Petition 46a-47a). They cite in Notes 18, 19, 20 and 21 certain testimony of Rossiter, Kratz and Bracken and the original suggestion to the Customer that Commercial Credit was buying accounts. Clearly as to the last it is a non sequitur that these accounts were received by Commercial Credit as payment.

Rossiter actually testified that the accounts assigned to Commercial Credit after August 26, 1953, had to be credited on the books to Howard in some manner, but that there is a difference between a credit for cash and a credit for account as given in the reserve adjustment account (R. III, 736-7).

Both Kratz and Bracken very definitely testified time and again that neither the returned merchandise nor the accounts taken after August 26, 1953, were accepted as payment, but simply as security (R. IV, 879, 882, 883; R. II, 267, 337, 338-9, 342) and the same thing is borne out by the testimony of Rogers, who was head of the Chicago office of Commercial Credit (R. II, 410, 411, 447, III, 527, 630-1, 635), and the testimony of Weber (R. II, 349). **"No witness testified to the contrary"** (Petition 13a).

As noted, too, in the Court's opinion (Petition 15a), neither Bob Howard nor any of his employees, which included Edward L. Foster, the husband of Petitioner Dorothy L. Foster, testified to the contrary, nor did Petitioners' accountant, Mr. Montag, claim that the books and records of Howard Corp. showed payment by acceptance of these additional accounts receivable or merchandise in payment, although Mr. Montag says that he had possession of these books and records at the time of trial (R. V, 1104-5).

This subject is discussed at length in the opinion of the Court of Appeals (Petition 13a-25a), from which it appears (Petition 16a, 22a-23a) that there was no evidence whatever

of an agreement being had between Howard Corp. and Commercial Credit to receive either the returned merchandise or the accounts as payment, and that, under the decisions of the Illinois courts, such an agreement was essential.

In this connection, it was held by this Court in **United States vs. Isthmian Steamship Co.**, 359 U.S. 314, 318-19, 79 S. Ct. 857, 860, that payment connotes tender by the debtor with the intention to satisfy the debt coupled with its acceptance as satisfaction by the creditor.

The authorities cited by Petitioners (48-9) of course lay down the correct general rule on a different state of facts, and are therefore completely inapplicable. For instance, the Court of Appeals was plainly correct in its conclusion that there was no question involved of the credibility of witnesses or the impeachment of Commercial Credit's books (Petition 7a-13a), whereas in **Hedger vs. Reynolds**, 216 Fed. 2d 202 (CA—2nd), the decision turned largely upon the credibility of witnesses.

This Court, in **Chesapeake & Ohio RR. Co. vs. Martin**, 283 U.S. 209, 218, said:

> "Where, however, the evidence of a party to an action is not contradicted by direct evidence, nor by any legitimate inference from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."

In addition to all else, a matter not mentioned by the Court of Appeals, all of the members of Respondent's credit committee testified that in making this loan to Howard Corp., action was predicated on Mr. Sorgel's guaranty (R. II 282, 407, 423, 441; I. 210; V. 1029-30). This was indeed

confirmed by Petitioner Sorgel as being the reason why his guaranty was required. (R. V. 1203). Under these circumstances it is completely incredible that Respondent, with a good and sufficient guaranty, after cancelling the contract on account of insecurity (R II 260-1) should have taken returned merchandise and accounts receivable, all at invoiced prices, in full payment. **Weger vs. Robinson Nash Motor Co.**, 197 NE 7, 11 (Ill. Sup.); **Spitz vs. Morse**, 72 Atl. 178 (Maine).

9. PETITIONER SORGEL LIABLE IN SPITE OF DISMISSAL OF OTHER TWO GUARANTORS

Although the guaranty was joint and several, Petitioner Sorgel claims that both the District Court and the Court of Appeals erred in holding him liable after the dismissal of the other two guarantors, Robert Howard and Dorothy L. Foster.

Respondent's motion for dismissal of these two guarantors stated "as grounds for dismissal of Mrs. Foster that it was believed that her plea of coverture was well taken, and as grounds for dismissal of Howard that he had never been served with citation, his whereabouts was unknown, and he was believed to be insolvent" (R. I. 2-3).

Mrs. Foster testified that she had lived in San Antonio, Texas, for nine years past as the wife of Edward L. Foster, by whom she was not joined in her signature on the guaranty, although she signed the instrument in San Antonio, Texas, where she was domiciled, and that she set up her coverture as a defense and was dismissed from the case (R. I. 138; R. V. 1094-5, 1098-9).

Petitioners rely upon **Rice vs. Webster**, 18 Ill. 331, **Clark vs. Mallory**, 56 NE 1099, and **United States vs. Wainer**, 211 Fed. 2d 669 (CA—7th).

The **Rice** case is indicated in the **Wainer** opinion, at page 673, to have been overruled by **Parmelee vs. Lawrence**, 44 Ill. 405, and the **Wainer** case itself relates to the compromise of a government claim and the release of one of two persons jointly and severally liable thereon. It completely distinguishes our case in the following language from page 672 of the opinion:

> "It is true that remedies against each of several debtors may be pursued where the debt is joint and several."

The **Clark** case is also an instance of a release, and this time of one of two **joint** obligors, reciting that certain things were received "in full settlement of all debts and demands of every name and nature", and was accompanied by a surrender of the notes representing the indebtedness.

National Surety Co. vs. United Brick & Tile Co., 71 SW 2d 937, 940 (Tex. CCA), and **George Scalfi & Co. vs. State**, 73 SW 441, would appear to support the right of Respondent to dismiss as against Bob Howard and proceed to judgment against Sorgel.

The cases of **Hamer vs. Pennell**, 86 Fed 2d 227, 229 (CA—5th), **Massey vs. Farmers' National Bank**, 104 Ill. 327, 331, **Gage vs. Mechanics' National Bank**, 79 Ill 62, and **Munoz vs. Brassel**, 104 SW 417, 418-9 (Tex CCA), would appear to amply support the right to dismiss as to Mrs. Foster on account of the defense personal to her and proceed against the other guarantor. See also opinion herein (Petition 33a-34a); **Lipe vs. Webster**, 278 SW 246 (Tex. CCA); and **Tinkham vs. Wright**, 163 SW 615, 619 (Tex. CCA)

As an exception to the general rule on conflict of laws: the law of the domicile prevails over all others with respect

to the protection of the married woman domiciled in Texas. **Union Trust Co. vs. Grossman**, 245 U S 412, 62 L. Ed. 368, 38 S. Ct. 147; **King vs. Bruce**, 201 SW 2d 303, 309 (Tex. Sup.); **Taylor vs. Leonard**, 275 SW 134, 135 (Tex. Civ. App.); **Bramwell vs. Conquest**, 2 SW 2d 995, 996 (Tex. App.)

Article 4623 of the Texas Statutes, until 1957, provided in part as follows:

> "The wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract."

10. PETITIONER SORGEL IS LIABLE IN SPITE OF INFORMALITY OF HOWARD CORPORATION RESOLUTION

The District Court and the Court of Civil Appeals were unquestionably right in not releasing Sorgel on this tenuous theory.

The obvious reason why the Court of Appeals did not specifically overrule this contention was that it said (Petition 5a) "this contract was a sale of accounts receivable," although "this contract was a loan contract" (Petition, Note 3a) — a thing manifest upon the face of the contract itself (Petition 45a); thus rendering it immaterial that the resolution of the corporate directors authorized a sale of accounts rather than a loan contract.

Furthermore, having, as shown in this resolution (R. I, 170), "read and examined" the contract, the directors must be presumed to know that under the law of Illinois it was a loan contract, as well, incidentally, as a sales contract. **Reighley vs. Continental Bank & Trust Co.**, 61 NE 2d 29 (Ill. Sup.).

There is also an estoppel against these director-stockholders to claim that the contract they executed for the corporation was invalid after having enjoyed the benefits of it. **Chicago Title & Trust Co. vs. Cohen,** 1 NE 2d 717 (Ill. Sup.); 19 C.J.S. 472

Finally, Sorgel as an absolute or unconditional guarantor, with independent consideration, consisting of his stock dividends in Howard Corp. **(Motor & Industrial Accident Board vs. Hughes,** 302 SW 2d 386, 391 [Tex Sup.]), was bound, regardless of the invalidity of the principal contract. **Holm vs. Jamieson,** 50 NE 702 (Ill. Sup.). In fact, the guaranty itself provides: "This guaranty shall not be affected, impaired, or diminished because any accounts, documents, invoices, or other paper writings are invalid, etc" (R. I, 138).

THE COURT OF APPEALS HAD THE RIGHT TO DIRECT ENTRY OF JUDGMENT FOR RESPONDENT

11. (Petition 55-6) This is in the nature of a rehash of things previously discussed with a lot of name calling.

12. (Petition 57-9) As for the apparent accusation that Commercial Credit stole $25,794.44 of stored merchandise, it is born of desperation and utterly baseless (a) because both the invoiced value of $68,445.56 of returned merchandise and the $42,013.93 of merchandise testified by Petitioners' accountant, Mr. Montag, to be left on hand, represent, not the market value or the real value, but the amount for which Howard Corp. sold it for in 1953 (R. V, 1130-1), (b) because dissipation or conversion of the security merchandise is not alleged and the only pleading of Petitioners about negligence and the only related finding of

the jury (R. I. 30, 52-3) concern the diligence of Respondent in selling the merchandise, and (c) because the creditor is not responsible to the unconditional guarantor for loss in the security taken from the principal after cancellation of the contract. **Beebe vs. Kirkpatrick,** 152 NE 539 (Ill. Sup.); **J. I. Case Co. vs. Laubhan,** 77 SW 2d 578 (Tex. CCA); **Joe Heaston Tractor & Implement Co. vs. Securities Acceptance Corp.,** 243 Fed. 2d 196 (CA—10th).

SUMMARY (Petition 59-60)

Nothing new is presented in this connection by Petitioners.

Sentilles vs. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S. Ct. 173, and **Revlon, Inc., vs. Buchanan,** 271 Fed. 2d 795 (CA—5th), cited by Petitioners (59-60), are both personal injury cases, involving facts and circumstances completely dissimilar to those here involved. The **Sentilles** case is a decision under the Jones Act, 46 U.S.C.A., Section 688.

The peculiarity of this case is that Respondent made its prima facie case, after offering the contract and guaranty (R. I. 136-8), by introducing its original ledger sheets (Petition 7a; R. III, 652-62), thereby putting upon Petitioners the burden of proof on their various and sundry defenses, as well as their counterclaim. Thus, instead of the cases cited by Petitioners, this Court's opinion in **Pennsylvania RR Co. vs. Chamberlain,** 288 U.S. 333, 53 S. Ct. 391, 393, importantly applies, it being there said:

> "We therefore have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event neither of them being established, judgment, as a matter of law, must go against the party upon whom

rests the necessity of sustaining one of these inferences as against the other."

Under the federal rule and the Wisconsin rule a 'scintilla' of evidence is not sufficient to require the submission of an issue to a jury, **Reitan vs. Travellers Indemnity Co.**, 267 Fed. 2d 66, 68 (CA—7th), and the same rule prevails in Texas, **Rounsaville vs. Bullard**, 155 Tex. 260, 276 SW 2d 791, 794.

Practically the sole issue here is the sufficiency of the evidence to support the verdict of the jury, and the thoroughness with which this big record has been reviewed and analyzed in the lengthy opinion of the Court of Appeals should assure this Court of the ultimate justice of its conclusions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

BERTHOLD MUECKE, JR.
J. FRANCIS IRETON
300 St. Paul Place
Baltimore, Maryland

CHARLES W. TRUEHEART
1910 National Bank of Commerce Bldg.
San Antonio 5, Texas

By:
Attorneys for Respondent Commercial Credit Corporation

PROOF OF SERVICE

I, Charles W. Trueheart, one of the Attorneys for Commercial Credit Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that a copy of the foregoing Brief for Respondent in Opposition, in the above captioned matter, was served on William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, and Dorothy L. Foster, Petitioners herein, by leaving a copy of same at the office of Mr. Leon P. Howell, 1412 Alamo National Building, San Antonio, Texas, one of the Attorneys of Record for said Petitioners, on the day of June, 1960.

CHARLES W. TRUEHEART
1910 National Bank of Commerce Building
San Antonio, Texas

Attorney for Respondent,
Commercial Credit Corporation

FILE COPY

FILED
OCT 31 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1960

No. 134

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,
PETITIONERS

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT

PETITION OF EXECUTOR, SORGEL, FOR REHEARING OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEON P. HOWELL
1412 Alamo National Building
San Antonio, Texas
Attorney for Petitioners

BRADFORD F. MILLER
519 Majestic Building
San Antonio, Texas
Of Counsel

SUBJECT INDEX

	Page
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	4
CONCLUSION	10

INDEX OF AUTHORITIES

List of Cases

	Page
American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534	6
Clark v. Gray, 306 U.S. 583, 59 S.Ct. 744	9
Cleveland Insurance Co. v. Globe Indemnity Co., 98 U.S. 336, 25 L.Ed. 201	9
Edwards v. E. I. DuPont de Nemours Co., 183 F.2d 185	6
Empire Coal Co. v. Empire Coal Co. of Tenn., 150 U.S. 159, 14 S.Ct. 66	9
Employers Reinsurance Co. v. Bryant, 299 U.S. 374, 57 S.Ct. 273	7
Fennell v. John Hancock Mutual Life Ins. Co., 177 F. 2d 737	9
Koster v. Lumberman's Mutual Casualty Co., 330 U.S. 518, 67 S.Ct. 628	8
Lang v. Patent Tile Co., Inc., 216 F. 2d 254	8
M.C. & Lake Michigan Ry. Co. v. Swan, et al, 111 U.S. 379, 4 S.Ct. 510	9
Polhemus v. American Medical Assn., 145 F. 2d 357	7
Preas. v. Prebus, 195 F. 2d 61	5
Preston v. Kaw Pipe Line Co., 128 F. 2d 162	5
Pullman Co. v. Jenkins, 305 U.S. 534, 59 S.Ct. 347	5
Sewell v. J. E. Crosbie, Inc., 127 F. 2d 599	5
Snow v. Powell, 189 F. 2d 172	6
St. Paul-Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586	6
Willoughby v. Sinclair Oil & Gas Co., 188 F. 2d 902	6

Statutes and Rules

F.R.C.P. 12(b), 28 U.S.C.A.	8
F.R.C.P. 13, 28 U.S.C.A.	8
28 U.S.C.A., Sec. 1332(a)	2
28 U.S.C.A., Sec. 1441 (c)	2, 5

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1960

No. 134

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,
PETITIONERS

VS.

COMMERCIAL CREDIT CORPORATION,
RESPONDENT

PETITION OF EXECUTOR, SORGEL, FOR REHEARING OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, petitions this Honorable Court for rehearing of his petition for a writ of certiorari in the above captioned cause, and in support thereof represents to the Court:

Petitioner restricts this petition for rehearing to one substantial ground available to him, which was not presented in the petition for a writ of certiorari, and consequently was not before the Court when it was denied.

QUESTION PRESENTED

Whether a federal court has jurisdiction of an action removed from a state court by a nonresident defendant where

(a) no separate and independent claim or cause of action against the removing defendant was averred, and the plaintiff sought and asked for only one recovery from one set of facts bringing about its single injury,

(b) prior to trial the plaintiff dismissed the nonresident removing defendant, with prejudice, thereby eradicating the sole basis for federal jurisdiction.

STATUTES INVOLVED

28 U.S.C.A. Sec. 1441(c). Actions removable generally —

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

28 U.S.C.A. Sec. 1332(a)(1). Diversity of citizenship; amount in controversy —

"(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy . . . is between:

"(1) Citizens of different States."

STATEMENT

Commercial Credit filed this suit on July 1, 1954, in the Circuit Court, Milwaukee County, Wisconsin, against Wil-

liam R. Sorgel (since deceased and the executor of his estate substituted), Dorothy L. Foster and Robert Howard as joint and several guarantors of a contract that had existed between it and Howard Distributing Corporation. The defendant, Dorothy L. Foster, had the cause removed to the United States District Court for the Eastern District of Wisconsin, on account of her diversity of citizenship, and it was thereafter transferred by that Court, for convenience of the parties, to the United States District Court for the Western District of Texas. (R I, 2-4)

The principal obligor, Howard Corp., was not named, or sued as a defendant. (R I, 5; VI, 1301)

William R. Sorgel was at the time the suit was instituted, and his estate still is, a resident of Ozaukee County, Wisconsin. (R I, 2-4,5) The defendants, Dorothy L. Foster and Robert Howard, were both residents of Texas. (R I, 2)

In its original complaint, Respondent sought and prayed for judgment, "against said defendants and each of them in the sum of $53,766.71, together with interest and the costs and disbursements of this action." (R VI, 1301-3)

On June 4, 1956, prior to the trial, the Respondent dismissed, with prejudice, its suit against the Texas defendants, Dorothy L. Foster and Robert Howard, over the objection of, and after contest by, the defendant, Sorgel. (R I, 3).

Following the dismissal of the Texas citizen, Dorothy L. Foster, the defendant, Sorgel, filed his motion to remand or dismiss the suit and same was denied by the District Court on September 30, 1957. (R III, 543)

Prior to dismissal of the Texas defendants and before the first trial of this action, the defendants in this suit, on January 13, 1956, filed a suit, identical to that set forth in the counterclaim herein, in the District Courts of Texas, at San Antonio, against this Respondent and other parties, and

issue therein was joined. The suit is still pending. Respondent herein is also required in that suit to prove and establish its claimed indebtedness against these defendants. (R. III, 541-2)

After the dismissal of the Texas defendants, Foster and Howard, Respondent filed its third amended complaint averring it was, "still complaining of defendant William R. Sorgel, but no longer complaining of Mrs. Dorothy L. Foster and Bob Howard." (R. I, 5) And sought and prayed for judgment against the defendant, William R. Sorgel, only. (R. I, 15)

The same claim, cause of action and injury are alleged in the complaint on which Respondent went to trial as were alleged in its original complaint. (R. I, 5-15; VI, 1301-3)

In response to Respondent's third amended complaint, the defendant, Sorgel, filed his answer and counterclaim, and proceeded to trial and judgment without waiving, but still insisting upon his objections to the jurisdiction of the federal court and his motion to remand or dismiss; and, further averred that the complaint failed to state a cause of action upon which relief could be granted against him, and "that this Court has no jurisdiction of the claim and cause of action attempted to be asserted by Plaintiff herein." (R. I, 16-36)

ARGUMENT

Lack of federal jurisdiction is asserted upon the grounds that, (a) no separate and independent claims or causes of action were present at the time of removal, and (b) prior to trial the Respondent dismissed the nonresident removing defendant, Foster, with prejudice.

Petitioner, Sorgel, had no part in removing this cause to the federal courts; such was the sole act of Texas defend-

ant, Foster. (R. I, 2) Prior to trial the defendant, Sorgel, filed his motion to remand or dismiss and upon denial of same he proceeded to trial and judgment subject to, and still insisting upon, his objections to the jurisdiction of the federal courts. (R. I, 16-32; III, 543)

Petitioner's objections to jurisdiction will be presented in the order above stated.

I. Was the case one which could be removed under *28 U.S.C.A. Sec. 1441 (c)?*

First, we must look to Respondent's original complaint to determine whether a separate claim or cause of action was present at the time the cause was removed by the Texas defendant, Foster. *Pullman Company v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347; *Preas v. Phelps*, 195 F. 2d 61; *Preston v. Kaw Pipe Line Co.*, 128 F.2d 162; *Sewell v. J. E. Crosbie, Inc.*, 127 F. 2d 599.

When we examine Respondent's original complaint, as well as the one on which it went to trial, it is found there is alleged only a single wrong, to-wit, the failure of Howard Corp to repay its advancements and a prayer for only one recovery arising out of that one fact. The original complaint, concluding, "plaintiff demands judgment against said defendants and each of them for the sum of," etc.; and, the amended complaint concluded with a prayer for judgment against the single defendant, Sorgel. (R. I, 5-16; VI, 1301-3) We do not believe Respondent will take issue on this point because in its reply to Petitioner's motion challenging jurisdiction it plead, "Plaintiff admits the original complaint did not show separate and independent claims or causes of action against the several defendants."

The complaint showing on its face that no separate claim or cause of action was alleged against the Texas defendant,

Foster, she did not have the right to remove this case from the state courts of Wisconsin to the federal courts, under *Sec. 1441 (c)*. The federal courts, therefore, acquired no jurisdiction of this civil action. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534; *Snow v. Powell*, 189 F.2d 172 (C.A.-10); *Willoughby v. Sinclair Oil & Gas Co.*, 188 F.2d 902 (C.A.-10); *Edwards v. E. I. Du Pont de Nemours Co.*, 183 F.2d 185 (C.A.-5)

In the *Finn* case, *supra*, this Honorable Court said:

> "The petition concluded with a prayer for joint and several judgment against the three defendants . . . (as did the original complaint in this action) . . . It cannot be said that there are separate and independent claims for relief as § 1441(c) requires. Therefore, we conclude there was no right of removal."

2. Assuming, *arguendo*, the federal courts acquired jurisdiction in the first instance, was same destroyed when Respondent dismissed the nonresident removing defendant?

Even if there had been separate and independent claims and causes of action alleged against the three defendants, when Respondent dismissed the removing defendant the separate and independent claims for relief ceased to exist, and the defendant, Sorgel, who had been involuntarily brought into federal court, was entitled to have the case against him dismissed or returned to the state courts, and, he timely so moved. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586; wherein Justice Roberts said:

> *"In the case of a separable controversy, if, after removal, the plaintiff discontinues or dismisses as to the defendant who removed, so that there no longer exists any separable controversy, the cause must be remanded.* If a cause be removed on this ground the whole case, including the controversy between citizens of the same state, is taken over by

> the Federal court only because one or more of the defendants is entitled to invoke its jurisdiction. The basis of Federal jurisdiction failing, it is proper that the remaining parties, who were involuntarily taken into Federal court, should, upon the cessation of the separable controversy which was the cause of their transmission to another tribunal, have their case returned to the state court." (Emphasis added)

Inasmuch, as the same parties here have joined issue on the identical claim and cause of action in the Texas courts, this suit should be dismissed rather than remanded to the Wisconsin courts. *Employers Reinsurance Corp v. Bryant*, 299 U.S. 374, 57 S.Ct. 273; *Polhemus v. American Medical Assn.*, 145 F.2d 357 (C.A.-10).

3. There remain only the questions of whether the defendant, Sorgel, invoked the jurisdiction of the federal courts by filing the compulsory derivative counterclaim and by proceeding to trial and judgment in the federal courts; and, whether this Honorable Court can consider the question of jurisdiction at this stage of the proceedings.

The Howard Corp. had been dissolved by judicial forfeiture of its charter on October 24, 1955. (R. I, 36, 40) Robert Howard, its only officer and director at the time of dissolution, refused to initiate the compulsory counterclaim. (R. I, 35, 40)

As to the first question, the defendant, Sorgel, brought the counterclaim in his capacity as a shareholder of the principal obligor, Howard Distributing Corporation, and not in his *individual* capacity, specifically pleading, "William R. Sorgel, in the representative capacity hereinafter stated, and in such capacity only, and Dorothy L. Foster, . . . hereinafter called counter plaintiffs, suing herein as common

stockholders of the Howard Distributing Corporation and all like stockholders of said corporation . . ."; concluding with a prayer for, "judgment in favor of and for and on behalf of the Howard Distributing Corporation, and its stockholders, against counter defendant, Commercial Credit Corporation, in the sum of $65,158.87, together with interest and for all costs of suit." (R. I, 34-6) The shareholder, Sorgel, was compelled to initiate this counterclaim. *Rule 13, F.R.C.P.*

Although Respondent's suit was against Sorgel in his individual capacity, as distinguished from his representative capacity as a shareholer of the principal obligor (R. I, 5-15), his joinder in the derivative counterclaim, as such a shareholder, could not give the federal courts jurisdiction of the claim for personal judgment against him. *Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518, 67 S.Ct. 628:

> "The cause of action which such a plaintiff (stockholder) brings before the court is not his own but the corporation's. It is the real party at interest."

On the second question, when Sorgel filed his answer and the derivative counterclaim and proceeded to trial and judgment he did so subject to, without waiving but insisting upon, his objections to the jurisdiction of the federal courts, as well as his motion to remand or dismiss; and, reiterated, "that this Court has no jurisdiction of the claim and cause of action attempted to be asserted by Plaintiff herein." (R. I, 16)

The Trial Court having previously denied his motion to remand or dismiss and overruled his objections to jurisdiction (R. III, 543) he had no choice, under the circumstances, but to proceed.

That Sorgel did not waive his objections challenging jurisdiction nor voluntarily invoke the jurisdiction of the

federal courts by his actions after denial of, and subject to, his objections and motion to remand or dismiss, is too fundamental to require citation of authority other than *Rule 12 (h), F.R.C.P.*

With respect to the final proposition, this Honorable Court has spoken so forcibly upon the subject it should be well settled, that the jurisdiction of the federal courts may be challenged at any stage of the proceedings. *M. C. & Lake Michigan Ry. Co. v. Swan*, et al, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed 462; *Clark v. Gray*, 306 U.S. 583, 59 S.Ct. 744; *Empire Coal Co. v. Empire Coal Co. of Tenn.*, 150 U.S. 159, 14 S.Ct. 66; *Cleveland Insurance Co. v. Globe Insurance Co.*, 98 U.S 336; 25 L.Ed. 201.

In the *Swan* case, *supra*, *this* Honorable Court said:

> "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, in this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it . . . it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do . . . when it appears on the record, by a plea to a jurisdiction, that it is a case to which the judicial power of the United States does not extend. The course of the court is . . . to reverse such a judgment for want of jurisdiction . . . Where it is shown, negatively; . . . that jurisdiction does not exist."

See also: *Lang v. Patent Tile Co., Inc.*, 216 F.2d 264 (C.A.-5); *Fennell v. John Hancock Mutual Life Ins. Co.*, 177 F. 2d 737 (C.A.-5).